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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT
BY OAK TREE ENERGY, LLC, AGAINST
NORTHWESTERN ENERGY FOR REFUSING
TO ENTER INTO A PURCHASE POWER
AGREEMENT

ES11-006

=====

Transcript of Proceedings
March 13, 2012

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, COMMISSIONER
GARY HANSON, COMMISSIONER

COMMISSION STAFF
John Smith
Rolayne Ailts Wiest
Karen Cremer
Kara Semmler
Ryan Soye
Greg Rislov
Ross Pedersen
Brittany Mehlhaff
Chris Daugaard
Brian Rounds
Jon Thurber
Demaris Axthelm
Deb Gregg

APPEARANCES
Sara Dannen, NorthWestern Energy

Reported By Cheri McComsey Wittler, RPR, CRR

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APPEARANCES BY TELEPHONE

Mike Uda, Oak Tree
Yvette LaFrentz, Oak Tree
Al Brogan, NorthWestern

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State
Capitol Building, 500 East Capitol Avenue, Pierre,
South Dakota, on the 13th day of March, 2012,
commencing at 2:20 p.m.

1 CHAIRMAN NELSON: We will move on to the next
2 docket, the next and the last docket. EL11-006, In the
3 matter of the claim by Oak Tree Energy, LLC against
4 NorthWestern Energy for refusing to enter into a purchase
5 power agreement.

6 And let me just check and make sure we've got
7 everybody still on the line.

8 Yvette LaFrentz.

9 MS. LAFRENTZ: Yes, I'm on the line.

10 CHAIRMAN NELSON: Mike Uda.

11 MS. LAFRENTZ: I will get him on the line.

12 CHAIRMAN NELSON: Okay. And Al Brogan.

13 MR. BROGAN: Mr. Chairman, yes, I am on the
14 line.

15 MR. UDA: Mr. Chairman, I had my phone on mute.
16 I am here.

17 CHAIRMAN NELSON: Okay. Very good.

18 Just a reminder for everybody, we do have a
19 court reporter, and if you could speak fairly slow so
20 that we can get all of your comments taken, we appreciate
21 that.

22 The way I want to do this we've obviously got a
23 couple of different questions that we're going to wrestle
24 with today. Since NorthWestern's Motion To Strike was
25 filed first, we're going to take that one first.

1 Sara Dannen is here present in person to present
2 that. We're going to deal with that one first. We will
3 probably vote on that. And then we will go into
4 Oak Tree's motions.

5 Before we get started, I probably better check,
6 Commissioner Hanson, are you back with us?

7 COMMISSIONER HANSON: So kind of you to be
8 concerned. Yes, I am.

9 CHAIRMAN NELSON: Excellent. Well, kind of need
10 that third vote in case we deadlock here. Thank you.

11 With that, Ms. Dannen.

12 MS. DANNEN: Thank you, Chairman Nelson.

13 Just as some preliminary matters on behalf of
14 NorthWestern Energy, I would like to say that I will be
15 arguing our Motion To Strike. I will also be arguing --

16 CHAIRMAN NELSON: I'm just going to interrupt
17 for a moment. We've got some background, some almost
18 wind-like noise coming across the telephone line so --

19 It just went away. Thank you.

20 MS. DANNEN: I will also be arguing against
21 Oak Tree's Motion To Strike, and Mr. Brogan will be
22 arguing on behalf of NorthWestern and Oak Tree's Omnibus
23 Motion.

24 CHAIRMAN NELSON: Thank you. We're still
25 getting some of that background noise. So if whoever's

1 on the lines if you could put your phones on mute, we'd
2 sure appreciate that.

3 Go ahead.

4 MS. DANNEN: And then one more, I guess,
5 preliminary matter. In NorthWestern's Prehearing Motion
6 it's broken down into three different areas to strike.
7 Would you like me to address them all at once or take
8 them issue by issue?

9 CHAIRMAN NELSON: I think you can address all
10 three of them at once. We'll probably vote on them
11 separately, but go ahead and take them all three at once.

12 MS. DANNEN: Okay. Thank you, Chairman Nelson.

13 May it please the Commission, Staff.
14 NorthWestern Energy is here today to argue its Prehearing
15 Motion. You will note that our motion asks for three
16 different requests.

17 The first is to strike portions of the rebuttal
18 testimony of J. Richard Lauckhart related to dockets
19 before the Montana Public Service Commission.

20 The second is to strike portions of relevant --
21 of rebuttal testimony, excuse me, of Michael Makens
22 related to expenses of litigation and the litigation as a
23 last resort.

24 And, finally, our third issue in our
25 Motion To Strike is striking the rebuttal testimony of

1 Mr. Thomas K. Anson in its entirety.

2 NorthWestern Energy will first address striking
3 certain portions of the rebuttal testimony of J. Richard
4 Lauckhart. First and foremost, Mr. Lauckhart's rebuttal
5 testimony as it relates to cases before the Montana
6 Public Service Commission is inadmissible and irrelevant.

7 Oak Tree is trying to paint this picture before
8 the Commission that NorthWestern's service territory
9 across state lines is the same thing, and that is simply
10 not the case.

11 NorthWestern Montana and NorthWestern
12 South Dakota are two different systems. For instance,
13 South Dakota -- our South Dakota system is in the eastern
14 interconnect. Montana is in the western interconnect.
15 South Dakota is near a MISO market. Montana has access
16 to other organized markets. South Dakota purchased our
17 capacity separate in separate agreements. Montana has no
18 defined capacity markets. Here in South Dakota we use
19 WAPA as a balancing authority, and in Montana we balance
20 our own load.

21 Here in South Dakota we operate most of our load
22 with base load resources and purchase very little in the
23 open market. It's kind of the reverse in Montana. In
24 Montana we produce very little in base load and look to
25 the markets for the rest of it.

1 A couple more points. South Dakota we're
2 vertically integrated over here, and in Montana we're
3 just starting that process of becoming more vertically
4 integrated.

5 And, finally, here in South Dakota, as the
6 Commission is well-aware, we have no mandatory renewable
7 portfolio standards where we have those in Montana.

8 It would be unfair for Oak Tree to make
9 South Dakota customers pay Montana rates. NorthWestern
10 South Dakota's avoided cost rate is much different than
11 our Montana avoided cost rate. And it would be unfair to
12 make our rate payers pay that cost. And Oak Tree, I
13 think, is trying to argue that, you know, by way of lines
14 connecting through the system it can be inferred that
15 South Dakota customers should pay the Montana avoided
16 cost rate.

17 Moreover, Montana law regarding the
18 establishment of an LEO is also irrelevant. And that is
19 why, you know, based on this -- primarily on irrelevant
20 and admissibility, NorthWestern is asking the Commission
21 to strike those portions of Mr. Lauckhart's rebuttal
22 testimony that are related to Montana Commission
23 proceeding dockets.

24 Now I'd like to move on to -- well, I guess I
25 will pause for questions at this point.

1 CHAIRMAN NELSON: Questions from the Commission?

2 MS. DANNEN: Second, I'll move into striking the
3 rebuttal testimony of Mr. Michael Makens. Mr. Makens in
4 his rebuttal testimony provides inflammatory comments
5 regarding the costs of litigation and that litigation was
6 a last resort for the Oak Tree project.

7 Comments regarding the costs of litigation are
8 irrelevant to the ultimate issue in this fact and should
9 play -- have no weight placed on them in this proceeding.
10 Mr. Makens is implying that NorthWestern has no costs in
11 this docket. That is false. NorthWestern's time,
12 energy, resources of its personnel -- it's had to hire
13 experts. There are certainly costs associated with this
14 docket that NorthWestern will feel at the end of the
15 day.

16 I'd like to point the Commission to a
17 South Dakota Supreme Court case, Smith v. Weber that says
18 that damages actions in which compensatory damages are
19 recoverable evidenced to show the wealth of either the
20 plaintiff or the defendant is not admissible. This is
21 not an action where compensatory damages are recoverable
22 and, therefore, the wealth of either NorthWestern or
23 Mr. Makens should not be laid part in this proceeding.

24 Mr. Makens' comments about bad faith
25 negotiations are also irrelevant. While details

1 surrounding the negotiation process may play into the
2 ultimate issue of whether an LEO was established, the
3 accusations contained in Mr. Makens' rebuttal testimony
4 regarding bad-faith negotiations by Northwestern have no
5 bearing on that ultimate issue and should be stricken
6 from the record.

7 Therefore, Northwestern respectfully asks the
8 Commission to strike the rebuttal testimony of Mr. Makens
9 as set forth in our motion.

10 CHAIRMAN NELSON: Questions from the Commission?
11 You may proceed.

12 MS. DANNEN: Thank you. Last and finally,
13 Northwestern asks the Commission to strike in its
14 entirety the testimony of Mr. Thomas K. Anson.

15 First I'd like to point the Commission to a
16 South Dakota Supreme Court Case Papke v. Harbert. In
17 allowing previously undisclosed expert testimony there
18 are three factors that the Commission should consider.
19 One is time. Two is whether the testimony pertains to a
20 crucial issue. And three is whether the expert's
21 testimony differs substantially from what was disclosed
22 in discovery.

23 Northwestern would argue that Mr. Anson's
24 testimony is untimely. The issue of an LEO has been here
25 in this proceeding since this proceeding's inception. It

1 was pled by Oak Tree in its initial -- or its initial
2 start of this case. Given that, Oak Tree -- the time for
3 Oak Tree to file Mr. Anson's testimony should have been
4 when it filed its direct testimony.

5 Second, on the issue of whether this expert
6 testimony pertains to a crucial issue in the case, there
7 is an issue of an LEO in this case, but I don't believe
8 it needs Mr. Anson's expert testimony to help the
9 Commission answer that question.

10 Pointing further to South Dakota Statute
11 19-15-2, giving the Commission guidance on expert
12 testimony, it states if scientific, technical, or other
13 specialized knowledge will assist the trier of fact to
14 understand the evidence or to determine the fact at
15 issue, a witness qualified as an expert by knowledge,
16 skill, experience, training, or education may testify
17 thereto in the form of an opinion.

18 NorthWestern would like to note that Mr. Anson
19 is not offering any expert opinion to assist the
20 Commission in actually understanding any evidence in this
21 matter. Or as a direct fact issue. Rather, Mr. Anson's
22 testimony is merely interpreting relevant case law
23 throughout the land on the issue of an LEO.

24 Finally, NorthWestern would also like to point
25 the Commission to State v. Guthrie, which states that

1 experts are not allow to testify as to legal conclusions,
2 which again is the primary basis of Mr. Anson's
3 testimony.

4 NorthWestern does agree with Staff on this
5 issue. As noted in Mr. Rounds' testimony, he thought
6 that it may be appropriate to take the issue of an LEO up
7 separately in a rule-making authority -- in a rule-making
8 process and -- so NorthWestern, Oak Tree, and others can
9 participate, and NorthWestern supports that position.

10 And, therefore, respectfully NorthWestern
11 requests that the Commission strike Mr. Anson's rebuttal
12 testimony in its entirety.

13 Thank you.

14 CHAIRMAN NELSON: Questions from the
15 Commission?

16 Seeing none, response from Oak Tree.

17 MR. UDA: Mr. Chairman, I was on mute just to be
18 sure the whistling noise was not coming from me.

19 CHAIRMAN NELSON: You know, it might well have.
20 Because it went away, but we can hear you loud and clear
21 now.

22 MR. UDA: Okay. Let's first talk about
23 Mr. Lauckhart's testimony. Can you hear me clearly,
24 Mr. Chairman?

25 CHAIRMAN NELSON: Yes, sir.

1 MR. UDA: First of all, Mr. Lauckhart compared
2 his rebuttal testimony taking into account the
3 differences between the Montana system that NorthWestern
4 owns and operates and the South Dakota system, and we
5 believe that NorthWestern's representations regarding the
6 two systems being different is inaccurate at best.

7 And in particular we are not trying to claim the
8 two systems are the same. We have taken into account in
9 Mr. Lauckhart's testimony the distinctions between the
10 two systems. That is specifically the information that
11 was prepared and submitted and attached in extensive
12 detail not only to Mr. Lauckhart's direct prefiled
13 testimony but also his rebuttal testimony, including
14 extensive documentation of his opinions.

15 It is beyond peradventure that the information
16 is directly relevant because Mr. Lauckhart's conclusion
17 after being faced with NorthWestern's direct and rebuttal
18 prefiled testimony was to state the only explanation for
19 why NorthWestern is saying one set of things to the
20 Montana Public Service Commission and another set of
21 things to the South Dakota Public Utilities Commission is
22 because in the one case they wanted to build their own
23 project and have the Montana Commission approve it and
24 put it into rate base. And the other case they did not
25 want to do a deal with Oak Tree.

1 How that information is not relevant under the
2 lenient standards of the South Dakota Rules of Evidence
3 401 is beyond me. It is simply inconceivable that that
4 information -- which goes directly not only to the
5 substance of Mr. Lauckhart's testimony and the decision
6 before the PUC on the question of the proper avoided cost
7 calculation but also to the credibility of NorthWestern's
8 witnesses. It is simply compelling evidence, not only
9 relevant evidence.

10 I don't want to belabor this point because
11 obviously there are a number of things to get to today.
12 And I don't want to take up too much of the Commission's
13 time. But I do want to directly refute some of the
14 things that Ms. Dannen has said.

15 Firstly, in the power industry both in the
16 western interconnect and the eastern interconnect, which
17 encompasses both Montana and South Dakota systems'
18 natural gas fire generation is on the margin the very
19 large portion of the time. So natural gas prices are
20 prime drivers in market power prices in both
21 interconnects.

22 The natural gas delivery system not separate
23 between the western interconnect and the eastern
24 interconnect. The gas delivery system interconnects all
25 of North America. Gas can be moved across North America

1 which results in high correlations of gas prices for gas
2 plans in the western interconnect and eastern
3 interconnect. Therefore, market prices in the western
4 interconnect region are highly correlated with market
5 prices in the eastern interconnect.

6 The second point is that theories of avoided
7 costs do not change between Montana and South Dakota.
8 Fundamental theories of supply and demand are the same in
9 Montana and South Dakota. Power can move between Montana
10 and South Dakota. The cost of new resources are the same
11 whether they are in Montana or South Dakota.

12 Although there is some input assumption details
13 that need to be taken into account in assessing these
14 differences --

15 CHAIRMAN NELSON: You might want to slow down
16 just a bit, sir.

17 MR. UDA: I apologize, Mr. Chairman.

18 But Mr. Lauckhart has taken those differences
19 into account in his calculations. However, and most
20 importantly, avoided cost theories, the value of wind,
21 and any fundamental analysis of the market are the same
22 whether they are in Montana or South Dakota. It is
23 appropriate for Oak Tree to point out how NorthWestern
24 modified its avoided cost theories, value of wind
25 theories, and fundamental analysis theories between its

1 testimony in Montana and its testimony before the
2 South Dakota Commission.

3 I think the other point that needs to be made in
4 response to Ms. Dannen's presentation is that the --
5 there is no unfairness in Mr. Lauckhart's testimony.
6 Mr. Lauckhart simply is responding to the testimony of
7 NorthWestern's purported experts, Mr. LaFave and
8 Mr. Lewis, and responding to same. And he was pointing
9 out that sometimes the same witnesses said different
10 things in different proceedings.

11 For example, before the Montana Commission
12 NorthWestern said, well, a prudent regulator would take
13 into account the risk of some sort of program by the
14 Environmental Protection Agency to regulate greenhouse
15 gases. In South Dakota they're not saying that. Now how
16 that changes between the Montana and South Dakota systems
17 based on a federal policy is a mystery to me.

18 I think the other point that I would make is
19 that with respect to this issue about whether or not the
20 South Dakota and Montana statutes governing the
21 acquisition or need to acquire renewable resources --
22 there is no question that the two statutes are different.
23 But the underlying premise of both is the same, which is
24 the cost of the resource -- the alternative to a
25 renewable resource is higher.

1 In that circumstance in neither South Dakota nor
2 Montana is the utility required to purchase a renewable
3 if it is more expensive than the alternatives. So in the
4 fundamental sense it is exactly the same.

5 Now I understand that the South Dakota program
6 is -- doesn't contain any penalties. But the fact is the
7 reason that NorthWestern made the presentations to the
8 Montana Commission that it did was in order to show that
9 this renewable energy that it was going to purchase from
10 its own project, a 40 megawatt project in Montana, was
11 less than the alternatives.

12 And when Mr. Lauckhart looked at what they did
13 in Montana and what they did in South Dakota, noted that
14 in the one instance they used a different witness and a
15 different methodology than they're using in this
16 proceeding. And that's why his testimony on these issues
17 is relevant. It's something that is important, indeed
18 critical, for the South Dakota Commission to consider.

19 Now the last issue she raises I'm confused by
20 because I don't believe Mr. Lauckhart ever offered any
21 opinion on the state of the law in Montana with respect
22 to legally enforceable obligations.

23 He did make some statements about whether he
24 believed -- I believe it was in his direct prefiled
25 testimony whether or not he believed Oak Tree had

1 preferred an LEO but he was -- was Mr. Anson simply
2 referring to FERC policy. Which is something I would
3 presume the Commission would be interested in considering
4 that it is charged by PURPA with implementing that FERC
5 policy.

6 Let's turn -- unless you want to ask me any
7 questions, I'll just turn to Mr. Makens.

8 CHAIRMAN NELSON: Any questions from the
9 Commission?

10 You may continue.

11 MR. UDA: Okay. With respect to Mr. Makens and
12 inflammatory comments, I think NorthWestern misapprehends
13 the purpose and intent of Mr. Makens' testimony.

14 One of the key issues in this case, as the
15 Commission knows -- I believe it's issue 2 -- is whether
16 or not Oak Tree incurred a legally enforceable
17 obligation. I mean, we obviously believe it did as of
18 February 25, 2011, by committing to sell its output to
19 NorthWestern.

20 However, one of the things which has come up and
21 we found disturbing and the purpose for Mr. Makens'
22 testimony is an attempt on the part of NorthWestern to
23 blame us for the failure of negotiations. And what
24 Mr. Makens' testimony goes to is the fact that we had
25 every incentive to negotiate with them.

1 NorthWestern's position simply makes no sense on
2 that score. Their position is, well, you know, you
3 should have said something about just the course of
4 negotiations did not explain the motivations of the
5 party. It's directly relevant to why negotiations never
6 took place.

7 Oak Tree, by every reason and position in logic,
8 had every incentive to try to avoid the expense of
9 litigation.

10 Now with respect to the idea that NorthWestern
11 Energy incurs cost as part of a proceeding, I would agree
12 that NorthWestern has certain obligations it has to
13 fulfill. And, for example, its Staff spends time and so
14 on on these proceedings and, indeed, has hired an outside
15 expert for this proceeding.

16 However, unless NorthWestern is conceding that
17 it's not going to seek rate recovery for the expenses in
18 this proceeding, the fact remains that Oak Tree who bears
19 all of its expenses is not in the same position as
20 NorthWestern Energy.

21 It has no incentive based on this not to
22 negotiate and, therefore, casts into doubt the
23 credibility of the statements made by Mr. LaFave that
24 somehow Oak Tree never even tried to engage NorthWestern
25 in negotiations.

1 With respect to Smith v. Weber and the damages
2 case, again, I think this case is not really applicable
3 to the situation here. The reason you're typically not
4 allowed to mention the relative wealth of the two parties
5 is because you don't want a jury in a fact-finding
6 situation to draw the conclusion that the parties -- the
7 richer party has, you know, every ability to pay and you
8 don't want to put that into the minds of the jury because
9 you don't want them making a decision based on an
10 irrelevant consideration.

11 That's not, as I stated previously, why we
12 introduced this testimony. We introduced this testimony
13 to show the negotiation process, what took place, why
14 Oak Tree had every incentive to negotiate, and the
15 imbalance and bargaining position between the parties.

16 This imbalance and bargaining position is
17 something that FERC has been acutely aware of over time.
18 Which is in 1980 in FERC Order 69 implementing these
19 regulations it created the whole legally enforceable
20 obligation in the first place, which was, it said very
21 clearly, that if you are in a situation where the
22 qualifying facility, which has a right to a contract,
23 comes to the utility and says, hey, we'd really like to
24 sell you our output and the utility stonewalls them and
25 refuses to sign the agreement, a legally enforceable

1 obligation is created. So when NorthWestern raises the
2 specter that somehow we were responsible, we need to
3 rebut that in order to make our case. And so I think
4 this question of motivation is directly relevant.

5 Now with respect to Mr. Anson, unless the
6 Commission at this time has any questions, which I would
7 take."

8 CHAIRMAN NELSON: Seeing none, go ahead.

9 MR. UDA: Okay. NorthWestern takes the position
10 that Mr. Anson's testimony was previously undisclosed and
11 is improper because it was, I presume, filed too late in
12 the process.

13 However, first of all, NorthWestern never asked
14 for any expert disclosures; who are you going to have
15 testify as an expert witness. That question was never
16 asked. If we had failed to comply with some sort of
17 Rule 26 disclosure under the Rules of Civil Procedure, I
18 might actually agree with NorthWestern.

19 However, they never asked that question.
20 Mr. Anson's testimony became important and, indeed,
21 pivotal to Oak Tree after reviewing the testimony of
22 Mr. LaFave, who offers, in our opinion, a considerable
23 number of legal opinions about what PURPA requires.

24 So Mr. Anson's testimony simply rebuts the
25 notion that PURPA and FERC policy require anything of the

1 sort. And we cited in our papers, and I don't have it in
2 front of you but you can refer to it if you like, a case
3 that says, specifically, with respect to expert testimony
4 on terms in the utility industry, the electric industry,
5 what they mean and how they're applied elsewhere, this is
6 an exception to the rule, that typically you don't allow
7 experts to testify on such policy and legal issues.

8 I agree that the LEO is a crucial issue in this
9 case. And this Commission is -- is being offered a
10 chance to establish policy. And it needs to know what
11 that FERC policy is.

12 Mr. Anson is an expert in this field. He's been
13 practicing both in front of FERC and in state and federal
14 courts on the issue of creation and formation of an LEO
15 pursuant to FERC policy for a long time.

16 And I think if you look at Mr. Anson's
17 qualifications, I think you will agree that he is
18 imminently qualified to offer the opinions that he's
19 offered.

20 Now Ms. Dannen also cites 19-15-2 with respect
21 to whether this will assist the trier of fact. One of
22 the determinations in this case is what facts matter with
23 respect to creation of a legally enforceable obligation.
24 That's a crucial issue.

25 And that's why, for example, Mr. Makens has

1 offered the testimony that he's offered. In this case
2 Mr. Anson's defining what facts matter to FERC. The
3 question is what does a QF have to do in order to create
4 a legally enforceable obligation under FERC policy. And
5 the answer to that question is they have to commit
6 themselves to sell their output to the utility and
7 nothing more. So Mr. Anson's testimony goes directly to
8 summation of that FERC policy.

9 Now the last issue I want to address is this
10 whole issue of the Staff's recommendation with respect to
11 having a rule making on a legally enforceable obligation.
12 And, you know, I agree that that's probably maybe a good
13 idea. But we have a case that's pending in front of this
14 Commission, and we believe that it's very clear that
15 we've incurred a legally enforceable obligation.

16 Now we think it's consistent with FERC policy,
17 and we think for the Commission to defer deciding that
18 issue places us in an untenable position. So although we
19 agree as a matter of a policy that the Commission might
20 want to take on this LEO issue in a broader proceeding
21 where a rule making is established and get input from all
22 the interested stakeholders, we think the Commission has
23 no choice but to reach this issue in this proceeding.

24 And that's all I have, Mr. Chairman.

25 CHAIRMAN NELSON: Thank you.

1 Staff.

2 MR. SOYE: Thank you, Mr. Chairman. This is
3 Ryan Soye. I am part of Staff. I will just address the
4 issues in the same order the parties did.

5 The first issue, whether or not to strike the
6 rebuttal testimony of Mr. J. Richard Lauckhart related to
7 the Montana PUC, NorthWestern has stated it is irrelevant
8 because of the different systems, interconnections,
9 market access, et cetera, are different. And Oak Tree
10 has said these differences have been taken into
11 consideration by their expert.

12 Staff doesn't know if that's been made
13 completely clear in the analysis they offered during
14 their testimony that they offered. However, Staff feels
15 the testimony should not be stricken for two reasons.

16 First, much of the testimony Staff understands
17 Oak Tree is making efforts to explore prior inconsistent
18 statements made by NorthWestern regarding wind projects.
19 This is a common practice in contested cases and Staff
20 feels, therefore, is relevant.

21 Second, although there are going to be many
22 differences between NorthWestern Energy's Montana systems
23 and South Dakota systems, we don't feel that that will
24 necessarily make the information inapplicable.

25 The differences that can be explained or

1 distinguished about what was done in Montana and what
2 needs to be done in South Dakota. Staff doesn't believe
3 these differences make the information irrelevant,
4 especially until we've had the opportunity to explore
5 more why these differences would make it irrelevant.

6 If nothing more, Staff feels the Commission
7 needs the chance to explore these issues more in depth
8 and determine for themselves what are the differences?
9 Why does it make it relevant? And then decide from
10 there. As of now, the information we've been provided in
11 the briefs I don't think makes that clear.

12 With respect to striking the rebuttal testimony
13 of Mr. Makens, relating to the litigation costs and
14 litigation as a last resort, with respect to comments of
15 NorthWestern's expense of litigation, Staff must agree
16 with NorthWestern.

17 Mr. Makens is testifying as a lay witness. He
18 has no personal knowledge of whether or not NorthWest
19 Energy will bear its own legal costs or how those will be
20 recovered and simply stating that, for instance, if
21 NorthWestern Energy filed a rate case, there is a
22 possibility that those litigation expenses could be
23 denied for some reason.

24 So it's also speculative. We just don't know
25 how those rates are going to be -- or those legal

1 expenses are going to be recovered or where they're going
2 to come from.

3 With respect to the expense as a last resort,
4 Staff feels we must agree with Oak Tree in that this does
5 go to a -- the issue of a legally enforceable agreement
6 and does go to the issue of process of negotiations that
7 occurred between Oak Tree and NorthWestern prior to the
8 Complaint being filed.

9 Next with the testimony on allegations of
10 bad-faith negotiations, again there's been a fair amount
11 of testimony by NorthWestern and Oak Tree concerning the
12 negotiation process that occurred prior to this Complaint
13 being filed, and those negotiation processes are very
14 relevant to whether or not a legally enforceable
15 obligation was established. So, therefore, we would
16 say -- we would -- Staff would recommend not to strike
17 the comments on bad-faith negotiations.

18 Finally, the Motion To Strike Rebuttal Testimony
19 Of Thomas Anson In Its Entirety, with respect to whether
20 Mr. Anson's testimony is undisclosed expert testimony and
21 is untimely, Staff feels that both parties have made
22 comments on the legally enforceable obligation.

23 Although it certainly was not fully explored
24 until recently, it seems that this -- through rebuttal
25 testimony, responsive testimony of each party, it's

1 developed into this full-blown issue now.

2 So Staff doesn't feel necessarily that it's
3 untimely expert testimony but just late in the game for
4 developing these full issues on the legally enforceable
5 agreement and sees this as proper rebuttal testimony in
6 response to Mr. Bleau LaFave.

7 Next, NorthWest Energy argued that the testimony
8 be stricken as it consists of legal conclusions. It's
9 not being offered as an expert opinion, and these
10 arguments are properly part of a legal argument to be set
11 forth in briefing. Staff does agree that a significant
12 majority of Mr. Anson's testimony appears to be
13 argumentative and such agreements are better left for the
14 posthearing briefing stage.

15 However, Staff feels Mr. Anson's testimony
16 carries the same tone and substance as that offered by
17 Mr. Bleau LaFave in his prefiled and rebuttal testimony
18 filed February 13, 2012. Simply as an example, one
19 question of Mr. Anson page 3, line 1, "What are the
20 qualifying facility's options under PURPA relevant to an
21 LEO?"

22 And I'll compare that to the questions asked of
23 Mr. Bleau LaFave at page 4, line 15, "What are the
24 requirements of a utility concerning a qualifying
25 facility requesting to provide energy and capacity under

1 PURPA?"

2 Both questions are going to interpretation and
3 presentation to the Commission of the framework and
4 processes of the PURPA requirements.

5 Staff believes, therefore, that NorthWestern
6 Energy may have slightly opened the door to this type of
7 rebuttal testimony from Mr. Anson through the testimony
8 offered by Mr. Bleau LaFave. As such, Staff believes the
9 rebuttal testimony of Mr. Anson, as it carries the same
10 tone and purpose of Mr. LaFave's testimony, should not be
11 stricken.

12 CHAIRMAN NELSON: Thank you.

13 Brief rebuttal, Ms. Dannen. If any.

14 MS. DANNEN: I was going to say, I guess
15 multiple comments by multiple parties. NorthWestern
16 would ask the Commission to, you know -- it relies on its
17 brief and its part of the submissions that, you know, the
18 Motions To Strike Mr. Lauckhart -- Mr. Lauckhart's
19 testimony are primarily in substance due to
20 inadmissibility and irrelevance.

21 Mr. Makens' testimony, his testimony should be
22 stricken because of the fact that he is giving opinions,
23 expert opinions, as to our cost, and he is not an expert
24 on our costs and that his accusations of bad-faith
25 negotiations should be stricken. And, finally,

1 Mr. Anson's testimony should be stricken for the reasons
2 set forth before. Because it was untimely. It can be
3 properly addressed in posthearing briefs, and he's
4 offering legal conclusions which are not proper expert
5 testimony.

6 Thank you.

7 CHAIRMAN NELSON: Thank you. Questions from the
8 Commission.

9 I have one for Mr. Uda. In your -- for Mr. Uda,
10 in your responsibilities to NorthWestern Energy's
11 Prehearing Motions on page 20 the last paragraph you make
12 a statement "The PUC is not a jury but rather a policy
13 making body."

14 Is that your opinion that in this matter we are
15 simply a policy making body?

16 MR. UDA: Mr. Chairman, this is a complicated
17 issue. And I -- excuse me? I'm sorry. I thought I
18 heard somebody say something.

19 CHAIRMAN NELSON: You're okay.

20 MR. UDA: Okay. So it's a complicated issue.
21 And, you know, I looked into this in some detail. And,
22 typically speaking, when administrative bodies such as
23 the Commission are delegated rate setting authority
24 that's typically thought to be sort of legislative policy
25 making.

1 But there's also the aspect that the Commission
2 is sitting as a quasi-judicial policy maker. And in this
3 case I think particularly that's a fact because what you
4 have in front of you is a policy question. What does it
5 take in the State of South Dakota to create the legally
6 enforceable obligation? And that is a policy question.

7 And I think with respect to Mr. Anson's
8 testimony in particular, I think that that's the role the
9 Commission is playing here.

10 CHAIRMAN NELSON: Thank you. I appreciate that.

11 Any other questions from the Commission?

12 Seeing none, are there motions?

13 COMMISSIONER HANSON: Mr. Chairman, I do have a
14 question of Staff. The information that was just
15 presented by Staff, I'm trying to find that anywhere on
16 the internet here. Is that something that has not been
17 provided to us, or do I have an e-mail on that
18 somewhere?

19 MR. SOYE: Mr. Commissioner, this is Ryan Soye.
20 I'm part of Staff. The comments of Staff on these
21 motions was not put into a formal letter to the
22 Commission.

23 Staff felt that we would need to wait to hear
24 all information that was presented by the parties in
25 their oral arguments prior to making any final

1 decisions.

2 COMMISSIONER HANSON: Thank you. Ryan, I found
3 a lot of your comments quite helpful, and I was looking
4 for -- do you have that in e-mail form that you could
5 send to me?

6 There's actually more questions there than what
7 I had anticipated and prepared for myself here. So I'm
8 not -- I guess I'll follow the Chair's direction as to
9 what questions he wishes to take. But if that's
10 something you can send me, I'd appreciate it.

11 CHAIRMAN NELSON: Thank you.

12 Commissioner Hanson, perhaps if I go ahead and
13 make a motion and then we can play off of that. Does
14 that sound fair?

15 COMMISSIONER HANSON: That's fair. Although
16 there's quite a bit of information here that I wanted to
17 digest. But I recognize there's a time frame as well.

18 So please go ahead, and thank you for the leeway
19 here. Go ahead.

20 CHAIRMAN NELSON: I would move that the
21 Commission deny NorthWestern Energy's Motion To Strike
22 The Testimony Of Mr. Lauckhart. I would -- and that the
23 Commission deny NorthWestern's Motion To Strike The
24 Rebuttal Testimony Of Mr. Makens with the sole exception
25 of Mr. Soye's recommendation that we strike or allow the

1 striking of the testimony regarding who's paying. And
2 that we grant NorthWestern Energy's Motion To Strike The
3 Rebuttal Testimony Of Mr. Anson.

4 Discussion on the motion.

5 COMMISSIONER FIEGEN: Question of Chairman
6 Nelson.

7 CHAIRMAN NELSON: Go ahead.

8 COMMISSIONER FIEGEN: So I know you have more
9 motions. If we're striking Mr. Anson's, will you be also
10 striking -- will you have another Motion To Strike --

11 CHAIRMAN NELSON: I have no prejudgment on any
12 other issues at this point.

13 COMMISSIONER HANSON: Mr. Chairman.

14 CHAIRMAN NELSON: Commissioner Hanson.

15 COMMISSIONER HANSON: Commissioner Fiegen, if I
16 may, and tell me if I'm interrupting you, I think
17 you're -- Commissioner Fiegen, I think you're going the
18 same direction I am.

19 I wish to treat the parties the same way here.
20 And if we're including one, we include the other. If
21 we're excluding one, we exclude the other. At least
22 that's my feeling.

23 COMMISSIONER FIEGEN: And I would agree,
24 Commissioner Hanson.

25 CHAIRMAN NELSON: Further discussion?

1 Seeing none, all those in favor will vote aye.
2 Commissioner Hanson.

3 COMMISSIONER HANSON: Still struggling a little
4 bit with would we still allow briefs to be filed by these
5 folks?

6 CHAIRMAN NELSON: Turning to Mr. Smith.

7 MR. SMITH: I don't think so. I mean,
8 they've -- this has been briefed to death, you know. And
9 we have a mountain of briefs and argument on this. And I
10 think Staff indicated it just had decided it would just
11 present its comments orally.

12 So I don't think so. And we're up against the
13 wall here in terms of time and -- we've got to know the
14 answers to these things.

15 COMMISSIONER HANSON: I know. But we get into
16 situations where we require additional information after
17 we get to a point, and I just don't want to get to a
18 point where we are not placing ourselves in a position
19 where we can't obtain information in the future.

20 But thank you, Mr. Chairman, for the leeway on
21 that question during the voting. And I will vote aye.

22 CHAIRMAN NELSON: Commissioner Fiegen.

23 COMMISSIONER FIEGEN: Fiegen votes aye.

24 CHAIRMAN NELSON: Nelson votes aye.

25 Motion carries.

1 MR. SMITH: Chairman Hanson. Or Commissioner
2 Hanson. You're not the chairman anymore.

3 I think I just understood your question. I
4 think I did. Is what you're asking whether or not there
5 will be additional briefs in this case following
6 hearing?

7 COMMISSIONER HANSON: That's correct.

8 MR. SMITH: I would assume there would be.
9 Absolutely. Once the hearing is over and we've heard it
10 and we have the final record, absolutely, I would expect
11 additional briefing at that point.

12 COMMISSIONER HANSON: Okay. And we would not be
13 excluding anyone from providing --

14 MR. SMITH: No. In fact, in terms of excluding,
15 you just voted to exclude Mr. Anson's testimony. That
16 will not exclude him from participating as an attorney in
17 the case if he wants to participate in the -- you know,
18 he would have to get pro hac vice status. But other than
19 that, he's able to practice here if he does that.

20 CHAIRMAN NELSON: Thank you, Mr. Smith. I
21 appreciate that clarification.

22 We will now move on to the motions from
23 Oak Tree. And if I understand correctly, we've got two
24 in particular, one dealing with the 20-year avoided cost
25 forecast, the second with determining whether or not as a

1 matter of law Oak Tree properly created an LEO, and then
2 also some motions to strike.

3 So with that, Oak Tree.

4 MR. UDA: Mr. Chairman, would it be your
5 preference that I handle the two separate -- the Omnibus
6 Motions separate from the Motion To Exclude?

7 CHAIRMAN NELSON: You know, I think I'm okay
8 with you presenting everything in one shot, and then
9 we'll probably break up the votes at the end.

10 Ms. Dannen may weigh in on that.

11 MS. DANNEN: Well, just from NorthWestern's
12 perspective, obviously, we'll handle it any way the
13 Chairman wishes, but NorthWestern will be splitting up
14 the arguments on separate motions, and I will be arguing
15 NorthWestern's arguments on the Motion To Strike and
16 Mr. Brogan will be handling NorthWestern's arguments on
17 the Omnibus Motion, if that helps at all.

18 CHAIRMAN NELSON: You know, maybe let's -- let's
19 split them into two parts then. And whichever you want
20 to take first, Mr. Uda, do that, and we'll work through
21 that one first.

22 MR. UDA: Thank you, Mr. Chairman. I'm going to
23 do the Omnibus Motion first, and I suspect it may take
24 longer than the Motion To Exclude, but you never know
25 about these things.

1 Mr. Chairman, at the outset I want to thank the
2 Commission for this opportunity. We are here before the
3 Commission, we believe, because NorthWestern has not
4 complied with your 1982 order that required utilities to
5 negotiate with QFs.

6 Under that policy if the utility doesn't
7 negotiate or cooperate, the PUC is supposed to resolve
8 the issues between the QF and the utility.

9 Here our opinion is we had a recalcitrant
10 utility and were forced to file the Complaint. Although
11 NorthWestern is blaming Oak Tree for the failure of these
12 negotiations, we don't believe NorthWestern's position is
13 credible, and we hope to prove it at the hearing.

14 Just a little background. Oak Tree is not a
15 large project. It's a 19 and a half megawatt wind
16 project located in Clark County. It needs a power
17 purchase agreement in order to fully construct its plant
18 and be eligible for production tax credits by the end of
19 2012. We need a decision from the PUC as soon as
20 possible to preserve those benefits both for the project
21 and for NorthWestern's rate payers.

22 With that in mind, we are requesting a summary
23 disposition pursuant to SDCL 1-26-8. This provision
24 states that summary disposition of certain cases,
25 opportunities shall be afforded to all parties to respond

1 and present evidence on issues of fact and argument on
2 issues of law or policy. However, each agency upon the
3 motion of any party may dispose of any defense or claim
4 if the pleadings, depositions, Answers to Interrogatories
5 and admissions on file together with affidavits, if any,
6 show there is no genuine issue as to any material fact
7 and a party is entitled to judgment as a matter of law.

8 We submit with the two issues that we are --
9 included in our Omnibus Motion, that they are ripe for
10 summary disposition. The first is whether Oak Tree has
11 the right to a full 20-year avoided cost forecast on
12 which to base the rate for its project. And, number two,
13 whether Oak Tree incurred a legally enforceable
14 obligation on February 25, 2011, when it committed to
15 sell its output to NorthWestern.

16 On the issue of the rights to a long-term power
17 purchase agreement, in our papers we cited the Federal
18 Regulation 18 CFR 192.304 and two cases which cite the
19 292.304(d) as giving to us the right to specify the terms
20 of the PPA.

21 The rule itself states "Purchase as available or
22 pursuant to a legally enforceable obligation. Each
23 qualifying facility shall have the option either to
24 provide energy or capacity pursuant to a legally
25 enforceable obligation for the delivery of energy or

1 capacity over a specified term."

2 Now the term "a specified term" means that once
3 a QF makes a commitment to sell its output to a utility,
4 it gets to determine how long that agreement is going to
5 be. Otherwise, it wouldn't make any sense if the utility
6 got to set a different term because they could
7 substantially interfere with the ability of a project to
8 obtain financing. And I'll discuss that a little bit
9 more in a minute.

10 NorthWestern basically tried to distinguish the
11 cases because they say, well, this is just dicta. So
12 there's another case that we'd like to offer, Smith
13 Cogeneration Management v. Oklahoma Corporation
14 Commission, 863 P.2d 1227, 1240 (1993) in which the
15 Oklahoma Supreme Court stated in deciding a series of
16 regulatory opt-out cases that an Oklahoma rule reopening
17 a QF power purchase agreement every five years was
18 preempted by PURPA.

19 The Oklahoma Supreme Court stated "FERC
20 regulations also grant cogenerators the right to
21 negotiate a long-term purchase contract with the price of
22 power to be purchased based on the avoided costs of the
23 utility calculated at the time of delivery or at the time
24 the obligation is incurred. Should a cogenerators choose
25 the latter method of calculation, it has the right to

1 receive the benefits of the contract even if due to
2 changed circumstances the contract price for power at the
3 time of the delivery is unfavorable to the utility."

4 In another regulatory opt-out case the Fifth
5 Circuit Court of Appeals in Agrilectric Power Partners
6 v. Entergy Gulf States, 207 F.3d 301, 304 n.5 (2000)
7 characterized the Smith Cogeneration case this way:

8 "Likewise, in Smith Cogeneration, Inc. v.
9 Oklahoma Corporation Commission, the Supreme Court of
10 Oklahoma invalidated a requirement by state regulators to
11 require regulatory opt-out price adjustment clauses in
12 all such wholesale power contracts. Significantly, the
13 court found the state's requirements of these clauses
14 conflicted with the party's federally guaranteed right to
15 fully negotiate long-term fixed rate wholesale power
16 contracts."

17 NorthWestern has offered no contrary authority
18 for the proposition that QFs have no such rights. The
19 plain language of the regulation, along with every
20 authority that Oak Tree has been able to find, supports
21 this proposition.

22 NorthWestern Energy has cited no contrary
23 authority or even a plausible counter-interpretation of
24 18 CFR 292.304(d). Another important point is that PURPA
25 also prohibits discrimination against QFs. Is

1 NorthWestern Energy financing its own projects on a
2 short-term basis?

3 At least in Montana NorthWestern gained approval
4 for a 25-year PPA for its own project. This is because
5 long-term contracts are needed to encourage the
6 development of any projects, including QFs, and FERC knew
7 this well.

8 NorthWest Energy next argues that Oak Tree
9 offers no authority for the proposition that a QF may
10 calculate its own avoided costs. However, this is a
11 matter of logic. If the utility refuses to produce a
12 long-term avoided cost forecast over a 20-year period, as
13 here, and a State Commission does not require the utility
14 to produce one, as here, the only option for the QF is to
15 calculate its own rate. It is not a matter of law. It
16 is a matter of logic.

17 NorthWest Energy next agrees that Oak Tree has a
18 right to be paid full avoided costs. But NorthWestern by
19 its own admission has not prepared a full avoided cost
20 forecast. Oak Tree agrees with NorthWestern that
21 NorthWestern Energy has not done so.

22 NorthWestern at this point now has the burden of
23 proof to show what Oak Tree's long-term avoided costs
24 would be over a 20-year period, and it cannot carry its
25 case. But NorthWestern is continually trying to argue

1 that -- sort of having it both ways. It has an electric
2 incremental price forecast. But NorthWestern can't have
3 it both ways.

4 There's simply no basis for assuming that a
5 long-term incremental price forecast is any more or less
6 reliable than an avoided cost forecast. And NorthWestern
7 presents a forecast based on methodology that was not
8 approved by the Montana Commission in Final Order 7108e
9 in Docket D2010.7.77.

10 NorthWestern then states that its deeply flawed
11 electric price forecast sets an upper limit on how much
12 Oak Tree can be paid. How can this be? Oak Tree has a
13 right to full avoided cost, which NorthWestern has not
14 prepared over the length of the contract. Although
15 NorthWestern has prepared an electric price forecast, it
16 has utilized a natural gas price forecast methodology
17 that Montana has not approved.

18 It is not a coincidence to Oak Tree that in
19 Montana when NorthWestern wanted to cost justify --

20 (Discussion off the record)

21 It is not a coincidence that in Montana where
22 NorthWestern Energy wanted to cost justify to Spion Kop
23 that the rate was twice what Northwestern Energy's
24 electric price forecast is when NorthWest Energy, as
25 here, does not want to buy output from a qualifying

1 facility.

2 CHAIRMAN NELSON: If I might just interject, you
3 were inserting a proper name in there; correct?

4 MR. UDA: Yes.

5 CHAIRMAN NELSON: And would you like to spell
6 that for our court reporter.

7 MR. UDA: I sure would. It's S-P-I-O-N K-O-P.

8 CHAIRMAN NELSON: Thank you.

9 MR. UDA: You bet. From the outset of this case
10 NorthWestern has refused to cooperate in any respect with
11 Oak Tree. During negotiations we asked them for avoided
12 cost information. Even the information that was already
13 required to be produced pursuant to 18 CFR 292.302. As
14 the Commission may recall, we had to file a Motion To
15 Compel just to get that information.

16 The position that NorthWestern took before the
17 Commission on the Motion To Compel with respect to a
18 20-year avoided cost forecast was that it was too
19 unreliable. And now we're being asked to sort of argue
20 about an electric price forecast that NorthWestern admits
21 is not an avoided cost forecast. And we think we have a
22 right under federal law to that long-term 20-year avoided
23 cost forecast.

24 The next argument NorthWestern has is that it's
25 asserted the claims that Black & Veatch is a national

1 expert on avoided costs because individuals and not firms
2 are experts. This is true in so far as it goes.

3 Mr. Lauckhart -- so the Commission knows this is part of
4 his testimony -- relied on electric price forecasts in
5 preparing his long-term 20-year avoided cost forecast.

6 There is nothing inaccurate or wrong with
7 Mr. Lauckhart's 20-year forecast based on the information
8 he had available to him prior to February 25, 2011 when
9 Oak Tree incurred its legally enforceable obligation.

10 In closing on this particular argument, I think
11 the logic is inexorable. Oak Tree has the right to a
12 full avoided cost over a 20-year term. There is no other
13 avoided cost forecast in this proceeding. And since
14 Oak Tree has the right to a 20-year full avoided cost,
15 the only evidence in this proceeding regarding the full
16 avoided cost for 20 years is the one prepared by
17 Mr. Lauckhart. There need not be a hearing on this
18 issue.

19 Northwestern cannot claim both it has an avoided
20 cost forecast and does not have one. I think this
21 20-year forecast that they've come up with is incomplete,
22 does not include all the elements of an avoided cost
23 forecast, and is too unreliable to counter
24 Mr. Lauckhart's expert testimony.

25 I would submit that this issue is a issue that

1 is ripe for summary disposition.

2 Do you wish me to proceed on to the LEO issue,
3 Mr. Chairman?

4 CHAIRMAN NELSON: I do. Thank you.

5 MR. UDA: Oak Tree believes FERC policy on the
6 legally enforceable obligation is now extraordinarily
7 clear in light of the Federal Energy Regulatory
8 Commission's recent announcements in the Cedar Creek
9 case.

10 As I'm sure the Commission knows, utilities have
11 an obligation to buy output from qualifying facilities
12 under PURPA. And PURPA adopted the LEO requirements
13 specifically to prevent what has happened here and having
14 a recalcitrant utility refuse to purchased from a QF.

15 In FERC Order 69 adopted in 1980 implementing
16 18 CFR 292.304(d)(2), FERC stated "Paragraph (d)(2)
17 permits a qualifying facility to enter into a contract or
18 other legally enforceable obligation to provide energy or
19 capacity over a specified term. Use of the term 'legally
20 enforceable obligation' is intended to prevent the
21 utility from circumventing the requirement that provides
22 capacity credit for an eligible qualifying facility
23 merely by refusing to enter into a contract with the
24 qualifying facility."

25 Under the recent holdings by FERC in JD Wind and

1 Cedar Creek Wind, if a QF makes a commitment to sell its
2 output to a utility, a legally enforceable obligation has
3 been created. FERC has made it very clear that State
4 Commissions may not impose additional requirements beyond
5 those in FERC's regulation.

6 This is made very clear in Cedar Creek Wind,
7 which stated "The PUC," referring to the Idaho PUC, "has
8 limited discretion to determine the LEO issue. Idaho PUC
9 and other protesters interpret West Penn's discussion to
10 give broad discretion to the states as to what
11 constitutes a legally enforceable obligation and when
12 such obligation is incurred. We disagree. While
13 West Penn stands to the notion that the Commission gives
14 deference to the states to determine the dates on which a
15 legally enforceable obligation is incurred, such
16 deference is subject to the terms of the Commission's
17 regulation. West Penn does not, as Idaho PUC argues,
18 give states the unlimited discretion to limit the way a
19 legally enforceable obligation is incurred." And the
20 cite there is to paragraph 35 of page 14 and 15.

21 More specifically, FERC stated "Like the
22 Public Utilities Commission of Texas, Texas PUC in
23 JD Wind 1, the Idaho PUC has imposed requirements on QFs
24 seeking to enter into agreements to sell electricity that
25 are in addition to those contained in the Commission's

1 regulations. In JD Wind 1 the Texas PUC refused to find
2 that a legally enforceable obligation existed because in
3 its view the QF was unable to provide 'firm' power. The
4 Commission disagreed with the Texas PUC and explained the
5 Commission's PURPA regulations do not contain any
6 reference to firm power. And when Texas PUC's reliance
7 on certain language in the regulatory text was incorrect,
8 similarly Idaho PUC requires that a legally enforceable
9 obligation can result only from a fully executed
10 contract. Like the requirement that a QF must provide
11 firm power, the requirement of a fully executed contract
12 is absent from the Commission's regulation."

13 The purpose of the LEO requirement is to prevent
14 just what NorthWest Energy did here. There is no real
15 dispute as to the facts. You can look at the letters,
16 the correspondence. There was no offer to negotiate.
17 There was just simply boiler plate language that was
18 offered in response to various Oak Tree inquiries
19 starting in June of 2010 and really terminating just
20 prior to the time that Oak Tree filed its Complaint.

21 The logic of the situation compels the
22 conclusions that Oak Tree had every incentive to
23 negotiate and cooperate in negotiations with NorthWestern
24 Energy. I think that you can compare what NorthWestern's
25 witnesses said in Montana with what they said in .

1 South Dakota and see that the distinction there is that
2 NorthWestern simply does not want to enter into a
3 contract, and that has been their attitude from the very
4 beginning.

5 NorthWestern has quibbled with the citation to
6 both Cedar Creek Wind and JD Wind because they did not
7 order the State Commissions to do anything and FERC has
8 never overruled its earlier statement that State
9 Commissions are responsible for determining an LEO.

10 First, FERC has the discretion under the federal
11 statute to decide whether to initiate the enforcement
12 action on its own, but it typically leaves that to the
13 parties to go to court. And, in fact, that's what
14 happened in both cases.

15 That does not mean that FERC did not provide
16 policy guidance to the State Commissions in those
17 decisions. They told both the States of Idaho and the
18 State of Texas their interpretation of the LEO was wrong
19 and that these states were not free to adopt an LEO
20 determination that added terms other than those that are
21 contained in the FERC regulation.

22 NorthWest Energy also argues that Oak Tree never
23 committed to sell its output to NorthWest Energy. Oak
24 Tree has made that commitment since February 25 of 2011.
25 This makes sense, if you think about it. NorthWestern is

1 really the only viable alternative for Oak Tree given
2 transaction costs associated with trying to sell its
3 output to another utility.

4 You are not required to weigh testimony that
5 makes no logical sense. You can read the proposed
6 testimony and exhibits and decide if Northwest Energy's
7 position makes logical, rational sense to you. I submit
8 that it does not for all the reasons I have mentioned.

9 I would also add that NorthWestern's Response
10 Brief to our motion on our LEO issue makes a startling
11 admission. On the bottom of page 8 and continuing on to
12 page 9 of that Brief NorthWestern Energy states "Oak Tree
13 has never committed to delivering anything to
14 NorthWestern. It has only committed to providing power
15 at a price far above NorthWestern's incremental cost if
16 Oak Tree actually builds the plant."

17 NorthWestern obviously misunderstands the LEO
18 issue. The issue is not that the utility gets to decide
19 what the avoided cost is. The issue is not whether or
20 not the plant is ultimately going to be built. The issue
21 is whether or not under the federal regulations Oak Tree
22 said we're going to sell all of our output to you. And,
23 in fact, followed up with a letter saying, hey, we really
24 don't want to file a Complaint with the PUC but we need
25 something from you other than just getting another letter

1 from you that repeats the same position over and over
2 again.

3 The utility does not have the right to dictate
4 the price. The utility does not have the right to say
5 your plant must be complete before we negotiate with you.
6 Under the FERC regulations Oak Tree incurred a legally
7 enforceable obligation when it told NorthWestern, hey,
8 here's our data. This is what we think we can sell to
9 you. We think it's below your avoided costs. We're
10 committing to sell all of our output to you over a
11 specified term of 20 years, and we think that's all we're
12 obligated to do.

13 At any rate, I think what -- the policy
14 question, and it's really more of a policy question, is
15 what is FERC's policy with respect to legally enforceable
16 obligations. And I would submit to you that Cedar Creek
17 Wind is direct evidence that FERC's policy is not changed
18 since FERC Order 69 that implemented these regulations in
19 the first place and that all it would take is for a
20 qualifying facility to come to the utility and say, hey,
21 we're -- we're sending you a contract, this is what we
22 want to do, and in response the utility does nothing,
23 which is exactly what happened here.

24 And with that I have nothing more on these two
25 motions.

1 CHAIRMAN NELSON: Thank you.

2 NorthWestern.

3 MR. BROGAN: Good afternoon, Chairman.

4 CHAIRMAN NELSON: Thank you. We can hear you
5 loud and clear.

6 MR. BROGAN: I'm going to start on this, the
7 speaker phone, but if I get to the point, Chairman
8 Nelson, where neither you nor the court reporter can hear
9 me, please let me know, and I will pick up the handset.

10 CHAIRMAN NELSON: So far so good.

11 MR. BROGAN: The first issue that Mr. Uda has
12 argued is that Oak Tree is entitled to use its 20-year
13 avoided forecast -- avoided cost forecast as the basis
14 for rates for the Oak Tree wind project.

15 NorthWestern asserts that it has a right to an
16 estimated 20-year avoided cost rate and that it has the
17 right to specify the length of its commitment. And Oak
18 Tree cites to --

19 CHAIRMAN NELSON: I think we're cutting in and
20 out now. Maybe we need to go back to the handset.

21 MR. BROGAN: Okay. I will do that. Oak Tree
22 cites to the FERC regulation --

23 I would note, Chairman Nelson, that I'm getting
24 a lot of echo on my handset. Is there some way that that
25 can be adjusted?

1 CHAIRMAN NELSON: Our tech person is going to
2 work on that.

3 MR. BROGAN: Thank you very much.

4 First off, neither of the cases that were cited
5 in Oak Tree's initial brief nor the two cases which
6 Mr. Uda just cited as new -- the Smith Cogen, case and
7 the Fifth Circuit -- I believe it was Fifth Circuit case,
8 207 F.3d 301 deal with allowing a QF to set the term of a
9 commitment. Both of those involve contracts.

10 And I guess I want to point out throughout his
11 advocacy Mr. Uda seems to conflate the concept of a -- an
12 agreed upon contract between a utility and a QF and a
13 forced purchase, forced by both federal law and a QF.

14 Parties can agree to things that they can't
15 necessarily be forced to do, and I think we need to keep
16 that in mind.

17 I would point out that none of those cases
18 establish any kind of precedent that the Commission
19 cannot determine the length of the commitment or the
20 length of a contract.

21 One of the cases that Oak Tree cited in its
22 initial motion, Omnibus Motion, was New York State
23 Electric & Gas Corporation v. Saranac Power Partners, LP.
24 I would quote from that case at 219 where the court
25 described the history and said "The" -- and I insert here

1 New York -- "PFC then ordered NYSEG to enter into a
2 15-year contract with Lockport's predecessor and
3 interest, Empire Energy Niagara Limited Partnership."

4 Clearly in that case and in all of the cases
5 either the parties agreed or the State Commission
6 determined the length of the contract.

7 Next, Oak Tree in Mr. Uda's exposition stated
8 that the fact that a QF can generate the avoided forecast
9 over the specified term itself is not a matter of law but
10 a matter of logic. NorthWestern would assert that it's
11 not factually reasonable to allow a QF to generate an
12 avoided cost forecast because of the impact of utility's
13 specific resources, utility specific operations, and
14 utility specific resource acquisition plans.

15 It's important to note that avoided cost is not
16 synonymous with market price. Except for those
17 utilities that are purchasing spot power in every hour of
18 the year.

19 Finally, Oak Tree asserts that
20 Mr. Lauckhart's -- Mr. Lauckhart's testimony provides the
21 only evidence of NorthWestern's avoided costs over a
22 20-year period. NorthWestern specifically disagrees.

23 There is substantial other evidence in this
24 docket from which the Commission will be able to
25 determine a 20-year avoided cost rate. First, Richard

1 Green's Exhibit RGG 022 shows NWE's avoided costs through
2 2016. And his testimony explains the necessity of
3 considering hourly load, estimated market prices, and the
4 marginal cost of NorthWestern's most expensive base load
5 generator, Big Stone, to calculate NWE's avoided cost.

6 Steven Lewis provides a 20-year estimate of
7 electric market prices for NorthWestern to use in
8 estimating its incremental costs. Bleau LaFave's
9 testimony provides NorthWestern's estimate of its 20-year
10 incremental cost, factoring in load growth, available
11 resources, the marginal cost of operating Big Stone, and
12 estimated market prices. Importantly, this incremental
13 cost is the maximum that NWE could avoid by purchasing
14 from Oak Tree.

15 In addition to NorthWestern's witnesses, the
16 Commission's Staff witness, Mr. Rounds, has filed
17 testimony in which he compared and contrasted
18 Mr. Lauckhart's forecast and NorthWestern's calculations
19 and stated I think NorthWestern's model is the most
20 accurate.

21 In addition to the evidence in the record,
22 NorthWestern believes that cross-examination of
23 Mr. Lauckhart and Mr. Makens will demonstrate the
24 inaccuracies and unreliability of Mr. Lauckhart's
25 forecast and that NorthWestern's South Dakota consumers

1 should not be required to pay for power far in excess of
2 what NorthWestern can acquire power elsewhere.

3 So given the overall legal issues, the
4 conflicting prefiled testimony, and the issues regarding
5 the validity of Oak Tree's estimate, NorthWestern
6 requests that the Commission deny this part of Oak Tree's
7 Omnibus Motion.

8 The second issue, as described in the agenda, is
9 has Oak Tree incurred an LEO? First Oak Tree asserts
10 that the individual states under PURPA have been left to
11 grapple with the question of when and whether an LEO was
12 incurred. But then Oak Tree asserts that FERC's recent
13 decisions in JD Wind 1, LLC and Cedar Creek Wind, LLC
14 have somehow eliminated a state's discretion to determine
15 what it takes to establish an LEO.

16 As NorthWestern stated in its response brief, it
17 disagrees with Oak Tree's overly broad interpretation of
18 both JD Wind and Cedar Creek. Mr. Uda correctly pointed
19 out that in neither case was FERC willing to initiate an
20 enforcement action.

21 He did, I believe, leave out a couple of very
22 important points with respect to states' discretion. In
23 JD Wind 1, FERC let stand the Texas restrictive
24 requirements to create an LEO. Mr. Uda said a utility
25 does not have a right to say a plant must be complete

1 before it can establish an LEO.

2 In Texas it was the Texas Commission, not the
3 utilities, that created that requirement. In Texas
4 there's an Administrative Rule that to create an LEO a
5 QF must demonstrate that it is able to deliver power
6 within 90 days.

7 FERC did not strike down that requirement in
8 JD Wind 1. It only said that the Commission's
9 interpretations that did not allow a constructed, ready
10 to generate wind plant to create an LEO was
11 impermissible.

12 Cedar Creek, likewise, in NorthWestern's opinion
13 is substantially narrower. Cedar Creek only stands for
14 the proposition that a State Commission may not make a
15 utility's execution of a power purchase agreement a
16 condition precedent to an LEO.

17 Next Oak Tree asserts that by committing to sell
18 its output to NorthWestern it has created an LEO. First,
19 NorthWestern asserts an illusory commitment which, is all
20 Oak Tree has made, is not really a commitment. Oak Tree
21 is not committed to anything because it's not committed
22 to actually building a project. At most at this point it
23 is committed to selling output from a -- from a project
24 that may or may not be built.

25 Second, NorthWestern asserts that it's you, the

1 South Dakota Commission, that has the authority to
2 establish what is necessary to create an LEO in
3 South Dakota and that after you have done so the parties
4 can argue as to whether or not Oak Tree has done what is
5 necessary.

6 Third, NorthWestern asserts that this legal
7 issue is not appropriate for decision without legal
8 argument and that that could not fully have been
9 developed at a time between March 5 when Oak Tree filed
10 its Omnibus Motion and March 8, the deadline for
11 NorthWestern to file its response.

12 Fourth, NorthWestern would point out that the
13 majority of states that have examined the LEO issue
14 require a potential QF to show that it is a viable
15 project before it can create an LEO, that there must be
16 something that actually involves a potential QF having
17 committed itself so that it can't walk away scot-free.

18 Oak Tree has not made any showing that it is
19 viable if it is paying NorthWestern's true incremental
20 costs or the lesser avoided cost.

21 As an addition, I would point out that the Texas
22 requirement that a -- essential requirement that a QF be
23 built before it can establish an LEO, in other words a
24 90-day rule, has been upheld by the federal courts. And
25 I would direct the Commission's attention to the case of

1 Public Resource Group, Inc. v, The Public Utility
2 Commission of Texas at 422 F.3d 231, which was decided by
3 the United States Court of Appeals for the Fifth Circuit
4 in 2005.

5 Given the legal uncertainties and the factual
6 disputes, NorthWestern requests that the Commission deny
7 Oak Tree's determination -- or, excuse me, Oak Tree's
8 motion for a determination that it incurred a legally
9 enforceable obligation on February 25, 2011.

10 With that, I would respond to any questions that
11 the Commissioners or Staff might have.

12 CHAIRMAN NELSON: Thank you. I think we'll go
13 to Staff, and then we'll come back to questions.

14 Staff.

15 MS. SEMMLER: Thank you. This is Kara Semmler
16 on behalf of Staff. You know, both of these issues are
17 big deal issues. They're issues of first impression that
18 this Commission is absolutely going to have to decide at
19 some point. Staff recommends, however, that you not make
20 the decision now. Rather, that you wait and hold a
21 posthearing briefing and argument process to fully debate
22 and discuss these legal issues.

23 You know, several months ago, the first part of
24 January, Staff anticipated these two questions would be
25 before you. And we actually had a conversation with both

1 parties about a prehearing process months ago to
2 eliminate these issues, to have a cleaner hearing.

3 And the parties for various reasons didn't want
4 to do that. At that time NorthWestern believed the
5 issues were so intertwined with the actual issues at the
6 hearing itself it didn't want to proceed. And the
7 procedural schedule being what it was, NorthWestern had
8 not submitted testimony at that time so Oak Tree didn't
9 know NorthWestern's position and they didn't want to
10 proceed at that time.

11 On top of it, Staff was told that the legally
12 enforceable obligation issue wouldn't ultimately have a
13 massive impact on the dollars, the avoided cost dollars.
14 Hence, our recommendation. Hence, Brian Rounds's
15 testimony that we can wait. Maybe we can issue a rule
16 making.

17 In addition we then relied on NorthWestern's
18 20-year numbers it presented in its testimony. Now we've
19 corrected our reliance on those numbers was maybe a
20 misplaced -- they've been corrected in the rebuttal
21 testimony.

22 But in summary I guess I want to let the
23 Commission know after hearing from the parties on these
24 issues the first part of January we didn't feel the need
25 to proceed months ago. And now we're stuck with the very

1 problem that Staff anticipated might happen. If Oak Tree
2 would prevail, we're left with a record that may be
3 lacking a bit. We're lacking rebuttal data.

4 So, frankly, we're a bit frustrated, but with
5 that said we do believe the best we can do at this point
6 is proceed to hearing. We need to hear the facts. We
7 need to hear the evidence that applies to these questions
8 to the extent they're not purely legal questions. And
9 Staff recommends you then hold a posthearing process to
10 fully brief and argue the issues.

11 CHAIRMAN NELSON: Thank you.

12 Mr. Uda, very brief rebuttal, please, if needed.
13 Mr. Uda, are you there?

14 MR. UDA: Yes, I am. I'm sorry. I had my phone
15 on mute, just in case Mr. Brogan couldn't be heard
16 because of anything on my end.

17 So I just want to briefly state, you know, with
18 respect to this whole issue of the right to a QF to
19 specify the term, you'll note that Mr. Brogan's argument
20 he did not provide any contrary authority. Nor did he
21 provide a plausible explanation of the plain meaning of
22 the regulation that the QF gets to specify the term of
23 its commitment.

24 And I disagree with Mr. Brogan with respect to
25 the import of those cases. Those cases state very

1 clearly that a QF has the right to a long-term contract.
2 And even though he cites Saranac as saying there's a
3 15-year agreement, NorthWestern hasn't agreed to a
4 15-year term either. Mr. Brogan's position is, is the
5 utility gets to decide it.

6 If that were the case, the utility could
7 circumvent its legally enforceable obligation simply by
8 saying we're only going to give you a five-year contract.
9 That cannot be the law.

10 Secondly, the cases I cite are very clear that
11 the reason that the court was discussing these issues
12 both in Smith Cogeneration and in the Fifth Circuit
13 decision was because they were trying to explain that if
14 you chop up a QF's right to receive revenue under its
15 contract, you're interfering with their ability to enter
16 into a long-term contract. And this is a fact that
17 Mr. Brogan fails to bring to your attention.

18 I think with respect to the issue on the 20-year
19 avoided cost forecast, NorthWestern is again trying to
20 have it both ways. The only party in this proceeding
21 who's developed the 20-year forecast is Oak Tree. The
22 reason Oak Tree did that is because it had to do that.
23 Because NorthWestern continues to say we sort of have an
24 avoided cost forecast. We don't have an avoided cost
25 forecast. And, indeed, many of the elements in an

1 avoided cost forecast are missing from all of the
2 testimony that Mr. Brogan cited.

3 So at this point if we have a right to full
4 avoided cost over a 20-year term, there's really no
5 dispute. The evidence in this record is overwhelmingly
6 clear. And I don't understand how a hearing is going to
7 cure that problem. Because the fact is there is no other
8 avoided cost forecast for a 20-year period before the
9 Commission.

10 Now with respect to the legally enforceable
11 obligation issue, I think all the distinctions that
12 Mr. Brogan wants to bring up with respect to the recent
13 FERC decisions are irrelevant. Texas does not say you
14 have to have a built facility. And, indeed, in the
15 Commission decision in Montana the Commission itself when
16 Mr. Brogan was the Staff attorney there pointed out that
17 Texas took an extreme position.

18 But the recent FERC decisions are very clear
19 that you can't impose additional requirements beyond
20 those that are in the regulations. You can't require the
21 project to be built. You're asking for a QF to make an
22 irretrievable commitment of resources without access to a
23 market. For example, an organized market such as MISO or
24 the California ISO. And you're saying, well, you have to
25 completely invest all of your money.

1 Now I don't understand how NorthWestern plans to
2 make its case on hearing on this either, considering
3 there isn't any evidence in this record about the state
4 of readiness of Oak Tree.

5 I suppose they can ask on cross-examination, but
6 I submit to you that the case as it stands right now
7 raises none of those issues about the readiness and
8 commitment of Oak Tree. We have said from the beginning
9 we're willing to sell our output. We think that's what
10 FERC policy requires. And we think that the Commission
11 should approve both motions because we're in the same
12 situation that NorthWestern was itself with respect to
13 Spion Kop. It told the Montana Commission we need
14 immediate action on this because we're in danger of
15 losing our ability to get production tax credits.

16 We're trying to shorten this hearing and not
17 spend additional valuable resources on this proceeding
18 when there really isn't an issue with respect to whether
19 Oak Tree did what it was required to do to create an LEO
20 or whether it has a right to a 20-year avoided cost rate
21 for its facility. Those are the two issues, and I think
22 they're very simple.

23 CHAIRMAN NELSON: Thank you. Questions from the
24 Commission?

25 I have two, and they both relate to the

1 establishment of the LEO issue, the second issue.

2 Mr. Brogan, you mentioned a number of
3 different -- that FERC allows, you know, states to
4 establish various requirements in their rules, and you
5 mentioned some of those. But we haven't done that here.
6 We haven't established any of those additional
7 requirements. And so why as a matter of law has this LEO
8 not been created, given our existing lack of rules?

9 Mr. Brogan, we can't hear you.

10 MR. BROGAN: Mr. Chairman, I'm sorry. I picked
11 up the handset, but didn't turn off the speaker phone.
12 Can you hear me now?

13 CHAIRMAN NELSON: We can hear you now.

14 MR. BROGAN: Mr. Chairman, State Commissions may
15 implement PURPA in three ways. One, they may adopt
16 rules. Two, they may issue orders in contested cases
17 that establish what is and isn't necessary in their
18 state. How they're going to do it. They can actually do
19 it as part of contested cases which establish precedent
20 within the state. Or, three, they can do a combination
21 of the two.

22 In South Dakota right now we don't have either
23 rules or precedent from the Commission. And until we
24 have one or the other, neither NorthWestern nor any other
25 utility in the State of South Dakota nor any potential QF

1 in the State of South Dakota know for certain what it
2 takes in South Dakota to create an LEO.

3 CHAIRMAN NELSON: Thank you. I appreciate that
4 response.

5 My second question for Mr. Uda, you've taken the
6 very firm position that you've created an LEO as of
7 February 25, 2011, and with that is your obligation to
8 deliver power. If we in this proceeding find that the
9 avoided cost is actually something -- and I'm just going
10 to pull a number, 35 bucks. 40 bucks. Do you still take
11 the position that you've created an LEO?

12 MR. UDA: Mr. Chairman, I think in my mind those
13 are two separate issues. Because the creation of an LEO
14 is basically the determination that the utility has the
15 right to buy the output. Now if it turns out that the
16 rate won't support financing, I'm not sure that there is
17 anything that can be done about that.

18 CHAIRMAN NELSON: So if I might interrupt, so do
19 you or don't you have an LEO at that point?

20 MR. UDA: I believe we have a legally
21 enforceable obligation at that point, yes.

22 CHAIRMAN NELSON: I have no further questions.
23 Other questions from the Commission?

24 COMMISSIONER HANSON: Mr. Chairman.

25 CHAIRMAN NELSON: Commissioner Hanson.

1 COMMISSIONER HANSON: I have a question of
2 Oak Tree. Curious what their opinion is, how long it
3 should have taken NorthWestern to prepare a 20-year
4 forecast.

5 MR. UDA: Commissioner Hanson, you know, I don't
6 want to put any undue burden on NorthWestern's resources.
7 But I think that if they had devoted -- they obviously
8 know how, based on Mr. LaFave's testimony, to prepare an
9 avoided cost forecast. And based on our review of what
10 was done in the Spion Kop proceeding in Montana, they
11 certainly know how to prepare an avoided cost forecast.
12 I don't think it would have taken them months and months
13 and months to do that.

14 I think the reason it took them as long as it
15 did was because they were even resisting providing
16 information with respect to the creation of this avoided
17 cost forecast. And then they basically said it's too
18 unreliable; we won't produce it. And now they're saying,
19 well, we kind of have something similar to it, and it's
20 not an avoided cost forecast, and they can't claim it is.

21 COMMISSIONER HANSON: So how long do you think
22 it would take?

23 MR. UDA: I think Mr. Lauckhart prepared his in
24 about a month.

25 COMMISSIONER HANSON: So it's your opinion that

1 you think they could prepare one in a month.

2 MR. UDA: I think they could do it much more
3 quickly than that because Mr. Lauckhart is a single
4 person just working on his own.

5 COMMISSIONER HANSON: All right. Thank you.

6 I have a question of Staff then as well.
7 Kara -- excuse me. Ms. Semmler, do you have -- either
8 you or another Staff member, do you have opinions on the
9 criteria that would be necessary for Oak Tree to have
10 incurred an LEO? And do those match with FERC
11 requirements?

12 MS. SEMMLER: We do have an opinion. And
13 obviously Staff chose not to share its opinions on the
14 substantive questions today and are sticking to our
15 recommendation that this be fully briefed and argued
16 posthearing. However, I can certainly go there if you
17 want me to.

18 COMMISSIONER HANSON: No. Actually it was a yes
19 or no question, and I wanted to know the answer just
20 so -- you answered it perfectly. As you always do.

21 Thank you, Mr. Chairman.

22 CHAIRMAN NELSON: Thank you. Further questions
23 from the Commission?

24 Seeing none, are there any motions?

25 COMMISSIONER HANSON: Mr. Chairman, if I may.

1 CHAIRMAN NELSON: You may.

2 COMMISSIONER HANSON: I fully concur with what
3 Staff has presented. This is a precedent setting
4 hearing. It's extremely important that we get it right.
5 Of course, with any docket it's important that we get it
6 right.

7 However, this is -- in this type of a hearing
8 where it's -- we are plowing new ground. And from that
9 standpoint, I'm comfortable with proceeding without going
10 through the process that Staff has recommended. And
11 that's my comment without a motion at this point.

12 CHAIRMAN NELSON: Is there a motion?

13 I will move that we deny both of these questions
14 at this time without making any prejudgment as to how we
15 will ultimately rule on these two questions.

16 Further discussion?

17 Seeing none, all those in favor will vote aye.

18 Commissioner Hanson.

19 COMMISSIONER HANSON: Aye.

20 CHAIRMAN NELSON: Commissioner Fiegen.

21 COMMISSIONER FIEGEN: Fiegen votes aye.

22 CHAIRMAN NELSON: Nelson votes aye. Motion
23 carries.

24 That brings us to the last issues of the day,
25 and that is Oak Tree's Motions To Exclude Certain

1 Testimony.

2 Go ahead, Oak Tree.

3 MR. UDA: Thank you, Mr. Chairman. The first --
4 there are three of these -- or two of these. Excuse me.
5 So I don't know -- I'm just going to go ahead and go
6 through them all in the interest of time, if that's okay.

7 CHAIRMAN NELSON: Certainly.

8 MR. UDA: Under the South Dakota rules, and we
9 heard some of this before from NorthWestern with respect
10 to -- with respect to Oak Tree's witnesses, before a
11 witness can testify as an expert the witness must be
12 qualified.

13 And under the United States Supreme Court's
14 decision in Daubert the proponent who's offering expert
15 testimony must show that the expert's theory or method
16 qualifies as scientific, technical, or specialized
17 knowledge as required under Rule 702. Before admitting
18 the expert testimony a court must first determine whether
19 such qualified testimony is relevant and based on a
20 reliable foundation. The burden of demonstrating the
21 testimony as competent, relevant, reliable, rests with
22 the proponent of the testimony. The proponent of the
23 expert testimony must prove its admissibility by a
24 preponderance of the evidence. And this is citing to
25 Burley v. Kyttec Innovative Sports Equipment, Inc.,

1 2007 SD 82, Paragraph 13, 737 N.W.2d 397, 402-403.

2 Therefore, in order for expert testimony to be accepted
3 by the PUC it must determine it is relevant by a
4 qualified expert based upon sufficient data, the product
5 of reliable principles or methods and, five, applied
6 reliably to the facts of the case.

7 Furthermore, the burden of proving that the
8 testimony meets these requirements lies on the party
9 who's offering the witness and the testimony. This is
10 citing State v. Lemler, 2009 SD 86, 774 N.W.2d 272,
11 among other cases. In this case NorthWestern has not met
12 its burden as it applies to Mr. Steven E. Lewis.

13 At the outset I would like to note we have no
14 doubt that Mr. Lewis has considerable experience in the
15 electric industry. But the fact that one is qualified to
16 testify in one area as an expert does not mean that they
17 are qualified to testify in another.

18 For example, in Tosh v. Schwab, 743 N.W.2d 422,
19 2007 SD 132, the court excluded Plaintiff's expert
20 testimony, finding that although the testimony was
21 relevant, Plaintiff's expert was not an expert in police
22 surveillance or interrogation. Instead his experience
23 was in the area of criminal corrections and treatment.

24 Daubert makes it very clear. There is a
25 guideline for assessing reliability. For example,

1 testing, peer review, error rate, and general acceptance.
2 Although these factors can't be applied in all settings
3 and sometimes reliability must focus on knowledge and
4 experience, a fundamental baseline for liability is that
5 experts are limited to offering opinions within their
6 expertise.

7 In this case we have tried extensively to
8 determine the foundation for Mr. Lewis's opinions and
9 qualifications. To date we have no evidence that
10 Mr. Lewis has ever been qualified as an expert to testify
11 on natural gas price forecasting, electric price
12 forecasting, or avoided cost.

13 In fact, we have not been able to determine that
14 any utility anywhere has ever utilized any of Mr. Lewis's
15 forecasts that have actually gone into determining
16 natural gas price, electric or avoided cost anywhere
17 other than NorthWestern.

18 There's no evidence of peer review or acceptance
19 of Mr. Lewis's methodology in any proceeding. As
20 Mr. Lauckhart points out, there are significant flaws in
21 Mr. Lewis's methodology. This Commission only required
22 Mr. Lewis to produce information regarding the forecast
23 he prepared for NorthWest Energy, and that does not
24 establish that Mr. Lewis is anything other than a
25 consultant providing input to NorthWest Energy's actual

1 experts in the Montana proceeding.

2 Despite ample opportunity to identify and detail
3 Mr. Lewis's experience in this particular area,
4 NorthWestern has not provided any. Mr. Lewis, based on
5 the record before the South Dakota Commission, is plainly
6 not qualified.

7 As I said previously, Oak Tree has no doubt that
8 Mr. Lewis may be an expert in general in various fields
9 in the electric industry, but there is no basis to
10 conclude that he has the expertise to perform long-term
11 electric price forecasts in any sort of way that would
12 qualify him as a expert.

13 The second test under the Daubert is whether
14 the opinions of the expert -- the opinions are valid.
15 Oak Tree requested information regarding any other
16 instance when Mr. Lewis's forecast may have been used to
17 calculate avoided costs. As I mentioned previously, none
18 have been provided. While it's not necessary the method
19 be the preferred method within the industry, there must
20 be evidence it has been subjected to some typed of peer
21 review.

22 NorthWest Energy has not provided any instances
23 where Mr. Lewis's method has been utilized. And, in
24 fact, one instance Mr. Lewis's method was not approved by
25 the Montana Public Service Commission.

1 Furthermore, NorthWest Energy does not rely on
2 Mr. Lewis's forecast in proposing its own wind project in
3 Montana. It would like the PUC to accept Mr. Lewis's
4 forecast for Oak Tree's wind project.

5 As we stated in Mr. Lauckhart's prefiled
6 rebuttal testimony --

7 (Discussion off the record)

8 MR. UDA: While it is not necessary that the
9 method be the preferred method within the industry, there
10 must be some evidence it's been subject to some kind of
11 peer review. And as stated previously, NorthWestern
12 hasn't provided any instances where Mr. Lewis's method
13 has been approved by any Commission or utilized within
14 the industry or analyzed by any peer group.

15 And as I stated, Mr. Lewis's method was not
16 approved by the Montana Public Service Commission in
17 Docket E2010.7.77. Also as I pointed out, NorthWest
18 Energy used a different expert and a different forecast
19 in proposing its own wind project in Montana, and yet it
20 would like the PUC to accept Mr. Lewis's forecast for
21 Oak Tree's wind project. Which we can debate what the
22 reason for that is, but to our mind that's because they
23 produced different results and avoided costs.

24 I think based on this that I think Mr. Lewis's
25 testimony with respect to his electric price forecast is

1 shown that he's not an expert on electric price
2 forecasting and nor is his method reliable and,
3 specifically, was rejected in one proceeding when it was
4 incorporated in another expert's testimony. And here
5 they're asking you to accept something that is very
6 different than what they did in Montana.

7 So with that, I think that there is no basis for
8 concluding that Mr. Lewis is qualified to offer the
9 opinions he's offering before this Commission.

10 Now with respect to Mr. LaFave, our original
11 motion said, well, Mr. LaFave is not a legal expert, and
12 he can't offer opinions on the law. NorthWestern's
13 position is now that Mr. LaFave isn't an expert but
14 merely a lay witness offering observations on PURPA.

15 Based on this admission, all of Mr. LaFave's
16 testimony regarding PURPA must be excluded. This is
17 because lay witnesses are offered only a limited ability
18 to testify regarding opinions. When Mr. LaFave starts
19 offering opinions regarding what PURPA requires and
20 whether an LEO exists in this case he is offering legal
21 testimony. He is telling you what the law requires. It
22 is plain that no lay witness may offer such opinions.

23 Under SDCL 19-15-1, Rule 701, if the witness who
24 is not testifying as an expert his testimony in the form
25 of opinions or inferences is limited to those opinions or

1 inferences which are, one, rationally based on the
2 perception of the witness and, two, helpful to a clear
3 understanding of its testimony or the determination of a
4 fact in issue. Generally the tool has been construed to
5 allow two types of lay opinions: Collective fact
6 opinions and skilled lay observer opinions.

7 A collective fact opinion is the expression of
8 an inference lay people commonly draw. Unable to
9 articulate all the century data supporting a logical
10 inference, the rule allows opinions on subjects such as
11 height, distance, speed, color, and identity. Lay
12 witnesses must have personal knowledge of the data
13 supporting their opinions.

14 In the second category, which is not applicable
15 here, courts allowed skilled lay observer opinions about
16 a voice, handwriting, or sanity. Clearly Mr. LaFave's
17 opinions do not fall within either of these categories as
18 can be seen from his direct rebuttal testimony.

19 For example, on page 6 starting at line 21.
20 "Question: Which is a legally enforceable obligation?
21 Where does that fit into FERC regulations?

22 "As described in the FERC rules I cited earlier,
23 FERC created the concept of an LEO to protect QFs from a
24 utility's refusal to sign a contract."

25 And it goes on like that. With respect to the

1 next page he talks about Mr. Lauckhart's testimony that
2 Oak Tree has created an LEO and about what he believes
3 that PURPA requires with respect to the creation of an
4 LEO.

5 So what Mr. LaFave is telling you here is his
6 opinion about what PURPA requires, his interpretation.
7 And this is the stuff of legal opinion, and Mr. LaFave
8 cannot testify in this fashion as a lay expert. His
9 opinions must be limited to his experiences under
10 South Dakota Law.

11 Mr. LaFave's statements offered in both prefiled
12 direct and rebuttal testimony that PURPA only requires
13 five years of avoided costs is also legally incorrect.
14 This statement is contradicted by FERC Regulations
15 18 CFR 292.302 as well as every scrap of legal authority
16 that Oak Tree can find.

17 There is also no evidence that Mr. LaFave has
18 been involved in PURPA. It is certainly not in his CV.
19 He has only been in his present position since 2011.
20 There are no PURPA contracts in South Dakota, at least to
21 my knowledge, and I have never seen Mr. LaFave testify in
22 any proceedings before the Montana PFC in cases regarding
23 PURPA.

24 So I think with that there isn't really any
25 question of what Mr. LaFave is doing is offering expert

1 legal testimony. He's not qualified to provide that
2 testimony. And, in addition to that, it violates the
3 South Dakota rules which limit lay witnesses to testimony
4 regarding their own personal experiences.

5 CHAIRMAN NELSON: Thank you. Rebuttal from
6 NorthWestern.

7 MS. DANNEN: Thank you, Commissioner Nelson. On
8 Oak Tree's Motion To Exclude Mr. Lewis's Testimony we
9 would point the Commission to State v. Fischer and
10 SDCL -- as previously mentioned by Oak Tree,
11 SDCL 19-15-2, areas in which the witness has superior
12 knowledge, skill, or experience or education with the
13 subject matter is what governs expert testimony. I will
14 not -- in the interest of time I will not belabor
15 everything in Mr. Lewis's curriculum vitae, but it is
16 extensive.

17 Specifically, Mr. Lewis has experience working
18 in power purchase agreements, which is going to include
19 some analysis of price forecasting.

20 Oak Tree mischaracterizes Mr. Lewis's testimony.
21 One, they claim that Mr. Lewis is testifying as to
22 NorthWestern's avoided cost. Mr. Lewis is not testifying
23 to NorthWestern's avoided cost. The primary purpose of
24 his testimony was to provide information related to price
25 forecasts in South Dakota wholesale market.

1 Oak Tree's also made baseless statements about
2 the reliability of Mr. Lewis's testimony and his methods.
3 Those baseless statements should have no effect on
4 whether this Commission rules he is qualified to testify
5 as an expert. Ultimately, that can go to the -- what
6 weight the Commission puts on his testimony at hearing
7 but to base statements as to the credibility of his
8 methods should play no -- should play no factor in your
9 decision today. Rather, you should look at his
10 education, his experience, and his qualifications.

11 On to the testimony of Mr. LaFave. Oak Tree I
12 guess kind of stole our thunder a little bit by taking
13 you to 19-15-1, the opinions of lay persons. We are not
14 offering Mr. LaFave's review of PURPA as merely anything
15 more than that. A review of PURPA that is rationally
16 based on his lay opinion. Mr. LaFave as evidenced in his
17 testimony has negotiated other wind contracts and has had
18 to review and review PURPA.

19 So to that extent the Commission can put the
20 credibility and the weight -- the same as they can in
21 Mr. Lewis's testimony -- to Mr. LaFave's testimony as his
22 layperson's opinion regarding PURPA and their
23 requirements.

24 And for those reasons NorthWestern respectfully
25 requests the Commission to deny both of Oak Tree's

1 motions.

2 And I'd like to add one more thing before the
3 Commission rules too, that I think the main distinction
4 in remembering -- in ruling and excluding Mr. Anson's
5 testimony, his testimony was given as an expert. Mr. --
6 in differentiating, Mr. LaFave's testimony is not being
7 offered for anything more than his opinion as to his
8 experience based on his past negotiations and dealing in
9 wind contracts as to the existence of PURPA.

10 Thank you.

11 CHAIRMAN NELSON: Thank you.

12 Staff.

13 MR. SOYE: Thank you, Mr. Chairman. This is
14 Ryan Soye. I'm part of Staff.

15 I'll begin with Staff's opinion on striking
16 Mr. Lewis's testimony in its entirety for lack of expert
17 qualifications. Here Staff agrees with NorthWestern
18 Energy on this matter. Under the SDCL 19-15-2 an expert
19 can be qualified by knowledge, skill, experience,
20 training, or education.

21 Staff feels Mr. Lewis is properly qualified upon
22 at least one if not several of these expert
23 qualifications. Oak Tree points to the fact that the
24 Montana PSC has rejected Mr. Lewis's methodology in at
25 least one instance for disqualifying him as an expert.

1 However, like the Montana PSC, this Commission is capable
2 to assess the credibility and qualifications of an expert
3 and whether the expert's opinions are justified by sound
4 analysis and sufficient data inputs have been provided to
5 convince this Commission of his methodology.

6 Next, in the alternative Oak Tree asks for a
7 Motion To Strike in the -- of Mr. Lewis's testimony based
8 on the avoided cost. Although there's been some back and
9 forth about what testimony has been provided by Mr. Lewis
10 and what he's providing through that testimony, it
11 appears NorthWestern Energy is adamant in the fact that
12 Mr. Lewis is not providing avoided cost energy. Instead
13 he's only testifying on future wholesale market price
14 forecast. It appears he has done this before for
15 NorthWestern Energy and in front of other commissions
16 such as the Montana Commission.

17 Staff believes this testimony is relevant to
18 judge the appropriateness of an avoided cost forecast.
19 We do not believe it substitutes an avoided cost forecast
20 but is certainly relevant, and we believe that Mr. Lewis
21 is capable of doing so.

22 Finally, the Motion To Strike Bleau LaFave's
23 testimony on technical matters of PURPA. Although this
24 Commission has determined that it's going to exclude the
25 testimony of Mr. Anson on the same subject, Staff doesn't

1 necessarily believe this requires excluding Mr. LaFave's
2 testimony.

3 As NorthWestern Energy stated, he is testifying
4 as a lay witness, and Staff feels this may be relevant to
5 the issue of a -- whether or not a legally enforceable
6 obligation was established, as Mr. Bleau LaFave was the
7 NorthWestern Energy representative dealing with Oak Tree
8 Energy. It goes to his actions, why he did what he did,
9 why he -- I'm sorry. Excuse me. What he thought he was
10 required to do under the PURPA regulations and maybe
11 relevant to the negotiation process leading up to this
12 dispute.

13 CHAIRMAN NELSON: Thank you.

14 Mr. Uda, very brief rebuttal, if needed.

15 MR. UDA: Okay. Mr. Chairman, I will do my very
16 best.

17 I think based on what Staff has said, I still
18 believe that although Mr. Lewis may be qualified in a
19 number of different areas, it does not mean he's
20 qualified to offer the opinions he's offered here. And
21 I'll leave it at that.

22 With respect to Mr. LaFave, I adamantly disagree
23 that it makes Mr. LaFave's testimony more acceptable
24 because he's testifying as a lay witness. A lay witness
25 under the rules is not allowed to offer testimony

1 concerning what the law requires. That is absolutely
2 100 percent clear. And if the Commission were to rule
3 otherwise, I think it would be making a serious error.

4 Mr. LaFave can testify all he wants about what
5 actually happened in the transactions. He can actually
6 testify about what was said to whom and why and
7 everything else, but what he may not do as a fact witness
8 is testify about what PURPA requires. That is, as I
9 said, the stuff of legal opinion. And he is plainly not
10 qualified to offer that opinion.

11 And so if you're going to strike Mr. Anson's
12 testimony, I think it is quid pro quo to strike
13 Mr. LaFave's testimony on that same subject matter.

14 CHAIRMAN NELSON: Thank you.

15 Questions from the Commission.

16 I have one for Mr. Uda. And this comes from
17 your Motion To Exclude Testimony, page 8. The first
18 paragraph where you're talking about specific line items,
19 and you have a sentence "Also Mr. LaFave's responsive
20 testimony from page 2, line 24 through page 3, line 1."

21 That's not making sense to me. Are those
22 accurate?

23 MR. UDA: It may not have been, Mr. Chairman. I
24 think in general we're just objecting to any testimony
25 where Mr. LaFave purports to offer legal opinion. And if

1 that is an inaccurate citation, we can certainly get the
2 right one to you.

3 CHAIRMAN NELSON: Well, now would be a pretty
4 good time if you want it.

5 MR. UDA: Okay. Hold on. I will get right to
6 it, Mr. Chairman. I need to pull it up.

7 CHAIRMAN NELSON: Mr. Smith may have a
8 suggestion for you.

9 MR. SMITH: In just looking at it, Mr. Uda, it
10 appears to me that perhaps an appropriate substitution
11 would be for line 24 substitute line 36?

12 MR. UDA: That would be fine, Mr. Smith. I
13 would take your recommendation.

14 MR. SMITH: I think up until then he's not
15 really opining on PURPA in that area. Maybe take a quick
16 look at it, but I think that's correct.

17 CHAIRMAN NELSON: Mr. Uda, please take a look at
18 that and make sure that's what you're after.

19 MR. UDA: Okay. I will do that right now,
20 Mr. Chairman. I had all of this stuff up, and then my
21 computer crashed. I apologize for the inconvenience. I
22 certainly know that it's late there in South Dakota, and
23 I'm not trying to make anybody stay there any longer than
24 they have to.

25 CHAIRMAN NELSON: Any other Commission questions

1 while his computer is coming back?

2 Commissioner Fiegen.

3 COMMISSIONER FIEGEN: I'd like to ask a quick
4 question of Staff on Mr. LaFave's testimony. I mean, he
5 can argue that in front of us during the hearing; is that
6 correct? No?

7 MR. SMITH: Not if you exclude it. But his
8 lawyer can. I think if you strike the testimony and if
9 you rule testimony with similar nature is not admissible,
10 the answer is no. But he has two competent legal counsel
11 who can make the arguments about if it's legal -- if
12 we're excluding it on the grounds that it's offering
13 legal opinions, they can do that in oral argument and
14 brief. And they're perfectly able to do that.

15 MR. UDA: Mr. Chairman, my computer is back up.
16 I have confirmed that Mr. Smith is right.

17 CHAIRMAN NELSON: So you're looking at line 36
18 and then the first two lines on the next page; correct?

19 MR. UDA: That's correct, Mr. Chairman.

20 CHAIRMAN NELSON: Thank you.

21 Further Commission questions?

22 COMMISSIONER HANSON: Chairman, this is
23 Gary Hanson. I appreciate Commissioner Fiegen just now
24 because it seems that the admonition and warnings and
25 such that we just received are certainly ones would take

1 place during a hearing and they have the ability to argue
2 at that juncture and we have the ability to determine
3 what should or should not be included.

4 Earlier in the meeting I said the quid pro quo
5 if one is out, then the other's out; if one's in, the
6 other's in.

7 However, after listening to Staff's
8 presentation, they make some valid arguments that I had
9 not considered at that time and they -- and Mr. Soye has
10 swayed me on that position.

11 That's all the comment I have. Thank.

12 CHAIRMAN NELSON: Other questions?

13 Are there any motions?

14 COMMISSIONER HANSON: Mr. Chairman, I don't
15 have -- I've been having challenges with my computer as
16 well, and I don't have the last question in front of me
17 that you were proposing here.

18 CHAIRMAN NELSON: Well, as I understand it, we
19 have two questions. One is to exclude the testimony of
20 Steven Lewis in full. And the second question is to
21 exclude portions of Bleau LaFave's testimony.

22 COMMISSIONER FIEGEN: Mr. Chairman, on the first
23 question, move that the Commission deny Oak Tree's
24 request to strike Steven Lewis's testimony in its
25 entirety.

1 CHAIRMAN NELSON: Discussion on that motion?
2 Seeing none, all those in favor will vote aye.
3 Commissioner Hanson.

4 COMMISSIONER HANSON: Aye.

5 CHAIRMAN NELSON: Fiegen.

6 COMMISSIONER FIEGEN: Votes aye.

7 CHAIRMAN NELSON: Nelson votes aye. Motion
8 carries.

9 Is there a further motion?

10 Commissioner Fiegen.

11 COMMISSIONER FIEGEN: John, if you can help me
12 with this motion, I do -- I would like to move that the
13 Commission strike part of LaFave's motion. Do I have to
14 go through all of these lines?

15 MR. SMITH: I don't think so. I think just
16 state in accordance with Oak Tree's Motion To Strike,
17 except that with respect to page 2 of his -- is it called
18 rebuttal or responsive testimony?

19 CHAIRMAN NELSON: Responsive.

20 MR. SMITH: That that reference to line 24 be
21 amended to line 36.

22 COMMISSIONER FIEGEN: So so moved.

23 CHAIRMAN NELSON: Discussion on that motion?
24 Seeing none, all those in favor will vote aye.
25 Commissioner Hanson.

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COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN NELSON: Nelson votes aye. Motion
carries.

(Proceedings concluded at 5:50 p.m.)

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 13th day of
11 March, 2012, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 25th day
14 of March, 2012.

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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<p>'firm' [1] - 45:3 'legally' [1] - 43:19</p>	<p>2011 [7] - 17:18, 36:14, 42:8, 46:24, 56:9, 63:7, 74:19 2012 [6] - 1:8, 2:9, 26:18, 35:19, 86:11, 86:14 2016 [1] - 52:2 207 [2] - 38:6, 50:8 21 [1] - 73:19 219 [1] - 50:24 231 [1] - 56:2 24 [3] - 80:20, 81:11, 84:20 25 [6] - 17:18, 36:14, 42:8, 46:24, 56:9, 63:7 25-year [1] - 39:4 25th [1] - 86:13 26 [1] - 20:17 272 [1] - 68:10 292.302 [2] - 41:13, 74:15 292.304(d) [1] - 36:19 292.304(d) [1] - 38:24 292.304(d) [2] [1] - 43:16 2:20 [1] - 2:10</p>	<p>701 [1] - 72:23 702 [1] - 67:17 7108e [1] - 40:8 737 [1] - 68:1 743 [1] - 68:18 774 [1] - 68:10</p>	<p>action [4] - 8:21, 46:12, 53:20, 61:14 actions [2] - 8:18, 79:8 actual [2] - 57:5, 69:25 acutely [1] - 19:17 adamant [1] - 78:11 adamantly [1] - 79:22 add [2] - 47:9, 77:2 added [1] - 46:20 addition [6] - 44:25, 52:15, 52:21, 55:21, 57:17, 75:2 additional [7] - 32:16, 33:5, 33:11, 44:4, 60:19, 61:17, 62:6 address [5] - 5:7, 5:9, 6:2, 22:9, 23:3 addressed [1] - 28:3 adjusted [1] - 49:25 adjustment [1] - 38:11 Administrative [1] - 54:4 administrative [1] - 28:22 admissibility [2] - 7:20, 67:23 admissible [2] - 8:20, 82:9 admission [3] - 39:19, 47:11, 72:15 admissions [1] - 36:5 admits [1] - 41:20 admitting [1] - 67:17 admonition [1] - 82:24 adopt [2] - 46:19, 62:15 adopted [2] - 43:12, 43:15 advocacy [1] - 50:11 affidavits [1] - 36:5 afforded [1] - 35:25 afternoon [1] - 49:3 AGAINST [1] - 1:4 Agency [1] - 15:14 agency [1] - 36:2 agenda [1] - 53:8 ago [3] - 56:23, 57:1, 57:25 agree [12] - 11:4, 18:11, 20:18, 21:8, 21:17, 22:12, 22:19, 24:15, 25:4, 26:11, 31:23, 50:14 agreed [3] - 50:12, 51:5, 59:3 AGREEMENT [1] - 1:6 agreement [10] - 3:5, 19:25, 25:5, 26:5, 35:17, 36:17, 37:4,</p>	<p>37:17, 54:15, 59:3 agreements [4] - 6:17, 26:13, 44:24, 75:18 agrees [3] - 39:17, 39:20, 77:17 Agrilectric [1] - 38:5 ahead [9] - 5:3, 5:11, 20:8, 30:12, 30:18, 30:19, 31:7, 67:2, 67:5 Ailts [1] - 1:14 AI [2] - 2:3, 3:12 allegations [1] - 25:9 allow [7] - 11:1, 21:6, 30:25, 32:4, 51:11, 54:9, 73:5 allowed [3] - 19:4, 73:15, 79:25 allowing [2] - 9:17, 50:8 allows [2] - 62:3, 73:10 almost [1] - 4:17 alternative [3] - 15:24, 47:1, 78:6 alternatives [2] - 16:3, 16:11 amended [1] - 84:21 America [2] - 13:25 amount [1] - 25:10 ample [1] - 70:2 analysis [5] - 14:21, 14:25, 23:13, 75:19, 78:4 announced [1] - 71:14 announcements [1] - 43:8 Anson [12] - 6:1, 9:14, 10:18, 17:1, 20:5, 21:12, 25:19, 26:19, 27:7, 27:9, 31:3, 78:25 Anson's [21] - 9:23, 10:3, 10:8, 10:21, 11:2, 11:11, 20:10, 20:20, 20:24, 21:16, 22:2, 22:7, 25:20, 26:12, 26:15, 28:1, 29:7, 31:9, 33:15, 77:4, 80:11 answer [4] - 10:9, 22:5, 65:19, 82:10 answered [1] - 65:20 Answers [1] - 36:4 answers [1] - 32:14 anticipated [3] - 30:7, 56:24, 58:1 apologize [2] - 14:17, 81:21 Appeals [2] - 38:5,</p>
0				
022 [1] - 52:1				
1		8		
<p>1 [7] - 26:19, 44:23, 45:1, 53:13, 53:23, 54:8, 80:20 1-26-8 [1] - 35:23 100 [1] - 80:2 1227 [1] - 37:14 1240 [1] - 37:14 13 [3] - 1:8, 26:18, 68:1 132 [1] - 68:19 13th [2] - 2:9, 86:10 14 [1] - 44:20 15 [2] - 26:23, 44:20 15-year [3] - 51:2, 59:3, 59:4 18 [5] - 36:18, 38:24, 41:13, 43:16, 74:15 19 [1] - 35:15 19-15-1 [2] - 72:23, 76:13 19-15-2 [4] - 10:11, 21:20, 75:11, 77:18 192.304 [1] - 36:18 1980 [2] - 19:18, 43:15 1982 [1] - 35:4 1993 [1] - 37:14</p>	<p>8 [3] - 47:11, 55:10, 80:17 82 [1] - 68:1 86 [1] - 68:10 863 [1] - 37:14</p>	9	<p>9 [1] - 47:12 90 [1] - 54:6 90-day [1] - 55:24</p>	

<p>56:3 APPEARANCES [2] - 1:21, 2:1 applicable [2] - 19:2, 73:14 applied [3] - 21:5, 68:5, 69:2 applies [2] - 58:7, 68:12 appointed [1] - 86:8 appreciate [7] - 3:20, 5:2, 29:10, 30:10, 33:21, 63:3, 82:23 appropriate [4] - 11:6, 14:23, 55:7, 81:10 appropriateness [1] - 78:18 approval [1] - 39:3 approve [2] - 12:23, 61:11 approved [5] - 40:8, 40:17, 70:24, 71:13, 71:16 area [4] - 68:16, 68:23, 70:3, 81:15 areas [3] - 5:6, 75:11, 79:19 argue [9] - 5:14, 7:13, 9:23, 39:25, 41:19, 55:4, 58:10, 82:5, 83:1 argued [3] - 26:7, 49:12, 65:15 argues [3] - 39:8, 44:17, 46:22 arguing [5] - 4:15, 4:20, 4:22, 34:14 argument [9] - 26:10, 32:9, 36:1, 41:24, 42:10, 55:8, 56:21, 58:19, 82:13 argumentative [1] - 26:13 arguments [7] - 26:10, 29:25, 34:14, 34:15, 34:16, 82:11, 83:8 articulate [1] - 73:9 aspect [1] - 29:1 assert [1] - 51:10 asserted [1] - 41:25 asserts [8] - 49:15, 51:19, 53:9, 53:12, 54:17, 54:19, 54:25, 55:6 assess [1] - 78:2 assessing [2] - 14:13, 68:25 assist [3] - 10:13, 10:19, 21:21 associated [2] - 8:13,</p>	<p>47:2 assume [1] - 33:8 assuming [1] - 40:4 assumption [1] - 14:12 attached [2] - 12:11, 86:11 attempt [1] - 17:22 attention [2] - 55:25, 59:17 attitude [1] - 46:3 attorney [2] - 33:16, 60:16 authority [10] - 6:19, 11:7, 28:23, 38:17, 38:20, 38:23, 39:9, 55:1, 58:20, 74:15 available [3] - 36:21, 42:8, 52:10 Avenue [1] - 2:8 avoid [2] - 18:8, 52:13 avoided [66] - 7:10, 7:11, 7:15, 13:6, 14:6, 14:20, 14:24, 33:24, 36:11, 37:22, 39:10, 39:12, 39:18, 39:19, 39:23, 40:6, 40:13, 41:11, 41:18, 41:21, 41:22, 42:1, 42:5, 42:12, 42:13, 42:14, 42:16, 42:19, 42:22, 47:19, 48:9, 49:13, 49:16, 51:8, 51:12, 51:15, 51:21, 51:25, 52:1, 52:5, 55:20, 57:13, 59:19, 59:24, 60:1, 60:4, 60:8, 61:20, 63:9, 64:9, 64:11, 64:16, 64:20, 69:12, 69:16, 70:17, 71:23, 74:13, 75:22, 75:23, 78:8, 78:12, 78:18, 78:19 aware [2] - 7:6, 19:17 Axthelm [1] - 1:19 aye [16] - 32:1, 32:21, 32:23, 32:24, 66:17, 66:19, 66:21, 66:22, 84:2, 84:4, 84:6, 84:7, 84:24, 85:1, 85:3, 85:4</p>	<p>25:10, 25:17, 27:24 balance [1] - 6:19 balancing [1] - 6:19 bargaining [2] - 19:15, 19:16 base [6] - 6:22, 6:24, 12:24, 36:12, 52:4, 76:7 based [19] - 7:19, 15:17, 18:21, 19:9, 37:22, 40:7, 42:7, 64:8, 64:9, 67:19, 68:4, 70:4, 71:24, 72:15, 73:1, 76:16, 77:8, 78:7, 79:17 baseless [2] - 76:1, 76:3 baseline [1] - 69:4 basis [6] - 11:2, 39:2, 40:4, 49:13, 70:9, 72:7 bear [1] - 24:19 bearing [1] - 9:5 bears [1] - 18:18 became [1] - 20:20 becoming [1] - 7:3 BEFORE [1] - 1:10 begin [1] - 77:15 beginning [2] - 46:4, 61:8 behalf [3] - 4:13, 4:22, 56:16 belabor [2] - 13:10, 75:14 believes [6] - 27:5, 27:8, 43:5, 52:22, 74:2, 78:17 below [1] - 48:9 benefits [2] - 35:20, 38:1 best [3] - 12:6, 58:5, 79:16 bet [1] - 41:9 better [2] - 4:5, 26:13 between [13] - 12:3, 12:9, 13:23, 14:7, 14:9, 14:25, 15:16, 19:15, 23:22, 25:7, 35:8, 50:12, 55:9 beyond [4] - 12:15, 13:3, 44:4, 60:19 Big [2] - 52:5, 52:11 big [1] - 56:17 bit [7] - 14:16, 30:16, 32:4, 37:8, 58:3, 58:4, 76:12 Black [1] - 41:25 blame [1] - 17:23 blaming [1] - 35:11 Bleau [8] - 26:6,</p>	<p>26:17, 26:23, 27:8, 52:8, 78:22, 79:6, 83:21 blown [1] - 26:1 bodies [1] - 28:22 body [2] - 28:13, 28:15 boiler [1] - 45:17 bottom [1] - 47:11 break [1] - 34:9 Brian [2] - 1:18, 57:14 brief [10] - 27:13, 27:17, 47:10, 47:12, 50:5, 53:16, 58:10, 58:12, 79:14, 82:14 briefed [2] - 32:8, 65:15 briefing [4] - 26:11, 26:14, 33:11, 56:21 briefly [1] - 58:17 briefs [5] - 24:11, 28:3, 32:4, 32:9, 33:5 bring [2] - 59:17, 60:12 brings [1] - 66:24 Brittany [1] - 1:17 broad [2] - 44:10, 53:17 broader [1] - 22:20 Brogan [12] - 2:3, 3:12, 4:21, 34:16, 58:15, 58:24, 59:17, 60:2, 60:12, 60:16, 62:2, 62:9 BROGAN [8] - 3:13, 49:3, 49:6, 49:11, 49:21, 50:3, 62:10, 62:14 Brogan's [2] - 58:19, 59:4 broken [1] - 5:6 bucks [2] - 63:10 build [1] - 12:22 Building [1] - 2:8 building [1] - 54:22 builds [1] - 47:16 built [5] - 47:20, 54:24, 55:23, 60:14, 60:21 burden [5] - 39:22, 64:6, 67:20, 68:7, 68:12 Burley [1] - 67:25 buy [3] - 40:25, 43:11, 63:15 BY [2] - 1:4, 2:1</p>	<p style="text-align: right;">C 2</p> <p>calculate [4] - 39:10, 39:15, 52:5, 70:17 calculated [1] - 37:23 calculation [2] - 13:7, 37:25 calculations [2] - 14:19, 52:18 California [1] - 60:24 cannot [5] - 39:24, 42:19, 50:19, 59:9, 74:8 capable [2] - 78:1, 78:21 capacity [7] - 6:17, 6:18, 26:25, 36:24, 37:1, 43:19, 43:22 Capitol [2] - 2:8 carries [6] - 26:16, 27:9, 32:25, 66:23, 84:8, 85:5 carry [1] - 39:24 case [43] - 4:10, 6:10, 8:17, 9:16, 10:2, 10:6, 10:7, 10:22, 12:22, 12:24, 17:14, 19:2, 20:3, 21:2, 21:9, 21:22, 22:1, 22:13, 24:21, 29:3, 33:5, 33:17, 37:12, 38:4, 38:7, 39:25, 41:9, 43:9, 50:6, 50:7, 50:24, 51:4, 53:19, 55:25, 58:15, 59:6, 61:2, 61:6, 68:6, 68:11, 69:7, 72:20 cases [19] - 6:5, 23:19, 35:24, 36:18, 37:11, 37:16, 46:14, 50:4, 50:5, 50:17, 50:21, 51:4, 58:25, 59:10, 62:16, 62:19, 68:11, 74:22 casts [1] - 18:22 categories [1] - 73:17 category [1] - 73:14 Cedar [9] - 43:8, 44:1, 44:6, 46:6, 48:16, 53:13, 53:18, 54:12, 54:13 century [1] - 73:9 certain [6] - 6:3, 18:12, 35:24, 45:7, 63:1, 66:25 certainly [10] - 8:13, 25:23, 64:11, 65:16, 67:7, 74:18, 78:20,</p>
	B			

<p>81:1, 81:22, 82:25 CERTIFICATE [1] - 86:2 Certified [2] - 86:6, 86:19 CERTIFY [1] - 86:8 cetera [1] - 23:9 CFR [5] - 36:18, 38:24, 41:13, 43:16, 74:15 chair's [1] - 30:8 CHAIRMAN [76] - 1:11, 3:1, 3:10, 3:12, 3:17, 4:9, 4:16, 4:24, 5:9, 8:1, 9:10, 11:14, 11:19, 11:25, 14:15, 17:8, 20:8, 22:25, 27:12, 28:7, 28:19, 29:10, 30:11, 30:20, 31:7, 31:11, 31:14, 31:25, 32:6, 32:22, 32:24, 33:20, 34:7, 34:18, 41:2, 41:5, 41:8, 43:4, 49:1, 49:4, 49:10, 49:19, 50:1, 56:12, 58:11, 61:23, 62:13, 63:3, 63:18, 63:22, 63:25, 65:22, 66:1, 66:12, 66:20, 66:22, 67:7, 75:5, 77:11, 79:13, 80:14, 81:3, 81:7, 81:17, 81:25, 82:17, 82:20, 83:12, 83:18, 84:1, 84:5, 84:7, 84:19, 84:23, 85:2, 85:4 chairman [35] - 3:13, 3:15, 11:17, 11:24, 14:17, 22:24, 23:2, 28:16, 29:13, 31:13, 32:20, 33:1, 33:2, 34:4, 34:13, 34:22, 35:1, 43:3, 49:3, 62:10, 62:14, 63:12, 65:21, 65:25, 67:3, 77:13, 79:15, 80:23, 81:6, 81:20, 82:15, 82:19, 82:22, 83:14, 83:22 Chairman [6] - 4:12, 5:12, 31:5, 49:7, 49:23, 63:24 challenges [1] - 83:15 chance [2] - 21:10, 24:7 change [1] - 14:7 changed [2] - 38:2, 48:17 changes [1] - 15:16 characterized [1] -</p>	<p>38:7 charged [1] - 17:4 check [2] - 3:6, 4:5 CHERI [1] - 86:5 Cheri [2] - 1:24, 86:18 choice [1] - 22:23 choose [1] - 37:24 chop [1] - 59:14 chose [1] - 65:13 CHRIS [1] - 1:11 Chris [1] - 1:17 Circuit [3] - 38:5, 56:3, 59:12 circuit [2] - 50:7 circumstance [1] - 16:1 circumstances [1] - 38:2 circumvent [1] - 59:7 circumventing [1] - 43:21 citation [2] - 46:5, 81:1 cite [3] - 36:18, 44:20, 59:10 cited [8] - 21:1, 36:17, 38:22, 50:4, 50:6, 50:21, 60:2, 73:22 cites [4] - 21:20, 49:18, 49:22, 59:2 citing [2] - 67:24, 68:10 Civil [1] - 20:17 claim [6] - 3:3, 12:7, 36:3, 42:19, 64:20, 75:21 claims [1] - 41:25 clarification [1] - 33:21 Clark [1] - 35:16 clauses [2] - 38:11, 38:13 cleaner [1] - 57:2 clear [14] - 11:20, 22:14, 23:13, 24:11, 43:7, 44:3, 44:6, 49:5, 59:10, 60:6, 60:18, 68:24, 73:2, 80:2 clearly [5] - 11:23, 19:21, 51:4, 59:1, 73:16 closing [1] - 42:10 Cogen [1] - 50:6 Cogeneration [4] - 37:13, 38:7, 38:8, 59:12 cogenerators [2] - 37:20, 37:24 coincidence [2] -</p>	<p>40:18, 40:21 collective [2] - 73:5, 73:7 color [1] - 73:11 combination [1] - 62:20 comfortable [1] - 66:9 coming [3] - 4:18, 11:18, 82:1 commencing [1] - 2:10 comment [2] - 66:11, 83:11 comments [12] - 3:20, 8:4, 8:7, 8:24, 17:12, 24:14, 25:17, 25:22, 27:15, 29:20, 30:3, 32:11 Commission [102] - 5:13, 5:19, 6:6, 6:8, 7:6, 7:20, 7:22, 8:1, 8:16, 9:8, 9:10, 9:13, 9:15, 9:18, 10:9, 10:11, 10:20, 10:25, 11:11, 11:15, 12:20, 12:21, 12:23, 15:2, 15:11, 16:8, 16:18, 17:3, 17:9, 17:15, 20:6, 21:9, 22:14, 22:17, 22:19, 22:22, 24:6, 27:3, 27:16, 28:8, 28:23, 29:1, 29:9, 29:11, 29:22, 30:21, 30:23, 35:2, 35:3, 37:14, 38:9, 39:13, 40:8, 41:14, 41:17, 42:3, 43:10, 44:13, 44:22, 45:4, 50:18, 51:5, 51:24, 53:6, 54:2, 54:14, 55:1, 56:2, 56:6, 56:18, 57:23, 60:9, 60:15, 61:10, 61:13, 61:24, 62:23, 63:23, 65:23, 69:21, 70:5, 70:25, 71:13, 71:16, 72:9, 75:9, 76:4, 76:6, 76:19, 76:25, 77:3, 78:1, 78:5, 78:16, 78:24, 80:2, 80:15, 81:25, 82:21, 83:23, 84:13 COMMISSION [3] - 1:1, 1:10, 1:13 Commission's [9] - 13:12, 43:8, 44:16, 44:25, 45:5, 45:12, 52:16, 54:8, 55:25 Commissioner [21] - 4:6, 29:19, 30:12,</p>	<p>31:14, 31:15, 31:17, 31:24, 32:2, 32:22, 33:1, 63:25, 64:5, 66:18, 66:20, 75:7, 82:2, 82:23, 84:3, 84:10, 84:25, 85:2 COMMISSIONER [36] - 1:11, 1:12, 4:7, 29:13, 30:2, 30:15, 31:5, 31:8, 31:13, 31:15, 31:23, 32:3, 32:15, 32:23, 33:7, 33:12, 63:24, 64:1, 64:21, 64:25, 65:5, 65:18, 65:25, 66:2, 66:19, 66:21, 82:3, 82:22, 83:14, 83:22, 84:4, 84:6, 84:11, 84:22, 85:1, 85:3 Commissioners [1] - 56:11 Commissions [5] - 44:4, 46:7, 46:9, 46:16, 62:14 commissions [1] - 78:15 commit [1] - 22:5 commitment [11] - 37:3, 44:1, 46:24, 49:17, 50:9, 50:19, 54:19, 54:20, 58:23, 60:22, 61:8 committed [8] - 36:14, 46:23, 47:13, 47:14, 54:21, 54:23, 55:17 committing [3] - 17:18, 48:10, 54:17 common [1] - 23:19 commonly [1] - 73:8 compare [2] - 26:22, 45:24 compared [2] - 12:1, 52:17 Compel [2] - 41:15, 41:17 compelling [1] - 13:8 compels [1] - 45:21 compensatory [2] - 8:18, 8:21 competent [2] - 67:21, 82:10 Complaint [5] - 25:8, 25:12, 35:10, 45:20, 47:24 COMPLAINT [1] - 1:4 complete [2] - 48:5, 53:25 completely [2] - 23:13, 60:25 complicated [2] -</p>	<p>28:16, 28:20 complied [1] - 35:4 comply [1] - 20:16 computer [4] - 81:21, 82:1, 82:15, 83:15 conceding [1] - 18:16 concept [2] - 50:11, 73:23 concerned [1] - 4:8 concerning [3] - 25:11, 26:24, 80:1 conclude [1] - 70:10 concluded [1] - 85:6 concluding [1] - 72:8 conclusion [2] - 12:16, 19:6 conclusions [4] - 11:1, 26:8, 28:4, 45:22 concur [1] - 66:2 condition [1] - 54:16 confirmed [1] - 82:16 conflate [1] - 50:11 conflicted [1] - 38:14 conflicting [1] - 53:4 confused [1] - 16:19 connecting [1] - 7:14 consider [2] - 9:18, 16:18 considerable [2] - 20:22, 68:14 consideration [2] - 19:10, 23:11 considered [1] - 83:9 considering [3] - 17:3, 52:3, 61:2 consistent [1] - 22:16 consists [1] - 26:8 constitutes [1] - 44:11 construct [1] - 35:17 constructed [1] - 54:9 construed [1] - 73:4 consultant [1] - 69:25 consumers [1] - 52:25 contain [2] - 16:6, 45:5 contained [3] - 9:3, 44:25, 46:21 contested [3] - 23:19, 62:16, 62:19 continually [1] - 39:25 continue [1] - 17:10 continues [1] - 59:23 continuing [1] - 47:11 contract [20] - 19:22, 37:21, 38:1, 38:2, 40:14, 43:17, 43:23, 45:10, 45:11, 46:3, 48:21, 50:12, 50:20,</p>
---	---	--	--	---

<p>51:2, 51:6, 59:1, 59:8, 59:15, 59:16, 73:24</p> <p>contracts [7] - 38:12, 38:16, 39:5, 50:9, 74:20, 76:17, 77:9</p> <p>contradicted [1] - 74:14</p> <p>contrary [3] - 38:17, 38:22, 58:20</p> <p>contrasted [1] - 52:17</p> <p>conversation [1] - 56:25</p> <p>convince [1] - 78:5</p> <p>cooperate [3] - 35:7, 41:10, 45:23</p> <p>Corporation [1] - 37:13</p> <p>corporation [2] - 38:9, 50:23</p> <p>correct [7] - 33:7, 41:3, 81:16, 82:6, 82:18, 82:19, 86:11</p> <p>corrected [2] - 57:19, 57:20</p> <p>corrections [1] - 68:23</p> <p>correctly [2] - 33:23, 53:18</p> <p>correlated [1] - 14:4</p> <p>correlations [1] - 14:1</p> <p>correspondence [1] - 45:16</p> <p>cost [64] - 7:10, 7:11, 7:12, 7:16, 13:6, 14:10, 14:20, 14:24, 15:24, 18:11, 27:23, 33:24, 36:11, 39:12, 39:19, 40:6, 40:13, 40:19, 40:22, 41:12, 41:18, 41:21, 41:23, 42:5, 42:12, 42:13, 42:14, 42:16, 42:20, 42:22, 47:15, 47:19, 49:13, 49:16, 51:12, 51:15, 51:25, 52:4, 52:5, 52:10, 52:11, 52:13, 55:20, 57:13, 59:19, 59:24, 60:1, 60:4, 60:8, 61:20, 63:9, 64:9, 64:11, 64:17, 64:20, 69:12, 69:16, 75:22, 75:23, 78:8, 78:12, 78:18, 78:19</p> <p>costs [22] - 8:5, 8:7, 8:10, 8:13, 14:7, 24:13, 24:19, 27:24, 37:22, 39:10, 39:18, 39:23, 42:1, 47:2, 48:9, 51:21, 52:1,</p>	<p>52:8, 55:20, 70:17, 71:23, 74:13</p> <p>counsel [1] - 82:10</p> <p>counter [2] - 38:23, 42:23</p> <p>counter-interpretation [1] - 38:23</p> <p>COUNTY [1] - 86:3</p> <p>County [1] - 35:16</p> <p>couple [3] - 3:23, 7:1, 53:21</p> <p>course [2] - 18:3, 66:5</p> <p>Court [7] - 8:17, 9:16, 37:15, 37:19, 38:5, 38:9, 56:3</p> <p>court [9] - 3:19, 38:13, 41:6, 46:13, 49:8, 50:24, 59:11, 67:18, 68:19</p> <p>Court's [1] - 67:13</p> <p>courts [3] - 21:14, 55:24, 73:15</p> <p>crashed [1] - 81:21</p> <p>create [9] - 22:3, 29:5, 53:24, 54:4, 54:10, 55:2, 55:15, 61:19, 63:2</p> <p>created [11] - 19:19, 20:1, 34:1, 44:3, 54:3, 54:18, 62:8, 63:6, 63:11, 73:23, 74:2</p> <p>creation [5] - 21:14, 21:23, 63:13, 64:16, 74:3</p> <p>credibility [5] - 13:7, 18:23, 76:7, 76:20, 78:2</p> <p>credible [1] - 35:13</p> <p>credit [1] - 43:22</p> <p>credits [2] - 35:18, 61:15</p> <p>creek [1] - 43:8</p> <p>Creek [8] - 44:1, 44:6, 46:6, 48:16, 53:13, 53:18, 54:12, 54:13</p> <p>Cremer [1] - 1:14</p> <p>criminal [1] - 68:23</p> <p>criteria [1] - 65:9</p> <p>critical [1] - 16:18</p> <p>cross [2] - 52:22, 61:5</p> <p>cross-examination [2] - 52:22, 61:5</p> <p>CRR [1] - 1:24</p> <p>crucial [4] - 9:20, 10:6, 21:8, 21:24</p> <p>cure [1] - 60:7</p> <p>curious [1] - 64:2</p> <p>curriculum [1] - 75:15</p>	<p>customers [2] - 7:9, 7:15</p> <p>cutting [1] - 49:19</p> <p>CV [1] - 74:18</p> <p style="text-align: center;">D</p> <p>d) [2] - 43:16</p> <p>D2010.7.77 [1] - 40:9</p> <p>DAKOTA [2] - 1:2, 86:1</p> <p>Dakota [53] - 2:7, 2:9, 6:12, 6:13, 6:15, 6:16, 6:18, 6:21, 7:1, 7:5, 7:9, 7:15, 8:17, 9:16, 10:10, 12:4, 12:21, 13:2, 13:17, 14:7, 14:9, 14:10, 14:11, 14:22, 15:2, 15:15, 15:16, 15:20, 16:1, 16:5, 16:13, 16:18, 23:23, 24:2, 29:5, 46:1, 52:25, 55:1, 55:3, 62:22, 62:25, 63:1, 63:2, 67:8, 70:5, 74:10, 74:20, 75:3, 75:25, 81:22, 86:7, 86:13</p> <p>Dakota's [1] - 7:10</p> <p>damages [4] - 8:18, 8:21, 19:1</p> <p>danger [1] - 61:14</p> <p>Dannen [7] - 1:21, 4:1, 4:11, 13:14, 21:20, 27:13, 34:10</p> <p>DANNEN [9] - 4:12, 4:20, 5:4, 5:12, 8:2, 9:12, 27:14, 34:11, 75:7</p> <p>Dannen's [1] - 15:4</p> <p>data [6] - 48:8, 58:3, 68:4, 73:9, 73:12, 78:4</p> <p>date [1] - 69:9</p> <p>Dated [1] - 86:13</p> <p>dates [1] - 44:14</p> <p>Daubert [3] - 67:14, 68:24, 70:13</p> <p>Daugaard [1] - 1:17</p> <p>days [1] - 54:6</p> <p>deadline [1] - 55:10</p> <p>deadlock [1] - 4:10</p> <p>deal [4] - 4:2, 12:25, 50:8, 56:17</p> <p>dealing [3] - 33:24, 77:8, 79:7</p> <p>death [1] - 32:8</p> <p>Deb [1] - 1:19</p> <p>debate [2] - 56:21,</p>	<p>71:21</p> <p>decide [6] - 24:9, 46:11, 47:6, 47:18, 56:18, 59:5</p> <p>decided [2] - 32:10, 56:2</p> <p>deciding [2] - 22:17, 37:15</p> <p>decision [9] - 13:5, 19:9, 35:19, 55:7, 56:20, 59:13, 60:15, 67:14, 76:9</p> <p>decisions [5] - 30:1, 46:17, 53:13, 60:13, 60:18</p> <p>deeply [1] - 40:10</p> <p>defendant [1] - 8:20</p> <p>defense [1] - 36:3</p> <p>defer [1] - 22:17</p> <p>deference [2] - 44:14, 44:16</p> <p>defined [1] - 6:18</p> <p>defining [1] - 22:2</p> <p>delegated [1] - 28:23</p> <p>deliver [2] - 54:5, 63:8</p> <p>delivering [1] - 47:13</p> <p>delivery [5] - 13:22, 13:24, 36:25, 37:23, 38:3</p> <p>demand [1] - 14:8</p> <p>Demaris [1] - 1:19</p> <p>demonstrate [2] - 52:23, 54:5</p> <p>demonstrating [1] - 67:20</p> <p>denied [1] - 24:23</p> <p>deny [7] - 30:21, 30:23, 53:6, 56:6, 66:13, 76:25, 83:23</p> <p>depositions [1] - 36:4</p> <p>depth [1] - 24:7</p> <p>described [3] - 50:25, 53:8, 73:22</p> <p>despite [1] - 70:2</p> <p>detail [3] - 12:12, 28:21, 70:2</p> <p>details [2] - 8:25, 14:12</p> <p>determination [5] - 46:20, 56:7, 56:8, 63:14, 73:3</p> <p>determinations [1] - 21:22</p> <p>determine [13] - 10:14, 24:8, 37:4, 44:8, 44:14, 50:19, 51:25, 53:14, 67:18, 68:3, 69:8, 69:13, 83:2</p> <p>determined [2] - 51:6,</p>	<p>78:24</p> <p>determining [3] - 33:25, 46:9, 69:15</p> <p>developed [3] - 26:1, 55:9, 59:21</p> <p>developing [1] - 26:4</p> <p>development [1] - 39:6</p> <p>devoted [1] - 64:7</p> <p>dicta [1] - 37:11</p> <p>dictate [1] - 48:3</p> <p>differences [9] - 12:3, 14:14, 14:18, 23:10, 23:22, 23:25, 24:3, 24:5, 24:8</p> <p>different [20] - 3:23, 5:6, 5:16, 6:12, 7:10, 12:6, 15:9, 15:10, 15:22, 16:14, 16:15, 23:8, 23:9, 37:6, 62:3, 71:18, 71:23, 72:6, 79:19</p> <p>differentiating [1] - 77:6</p> <p>differs [1] - 9:21</p> <p>digest [1] - 30:17</p> <p>direct [9] - 10:4, 10:21, 12:12, 12:17, 16:24, 48:17, 55:25, 73:18, 74:12</p> <p>direction [2] - 30:8, 31:18</p> <p>directly [6] - 12:16, 13:4, 13:13, 18:5, 20:4, 22:7</p> <p>disagree [3] - 44:12, 58:24, 79:22</p> <p>disagreed [1] - 45:4</p> <p>disagrees [2] - 51:22, 53:17</p> <p>disclosed [1] - 9:21</p> <p>disclosure [1] - 20:17</p> <p>disclosures [1] - 20:14</p> <p>discovery [1] - 9:22</p> <p>discretion [6] - 44:8, 44:10, 44:18, 46:10, 53:14, 53:22</p> <p>discrimination [1] - 38:25</p> <p>discuss [2] - 37:8, 56:22</p> <p>discussing [1] - 59:11</p> <p>Discussion [2] - 40:20, 71:7</p> <p>discussion [6] - 31:4, 31:25, 44:9, 66:16, 84:1, 84:23</p> <p>dispose [1] - 36:3</p> <p>disposition [4] -</p>
--	---	--	---	---

<p>35:23, 35:24, 36:10, 43:1 dispute [3] - 45:15, 60:5, 79:12 disputes [1] - 56:6 disqualifying [1] - 77:25 distance [1] - 73:11 distinction [2] - 46:1, 77:3 distinctions [2] - 12:9, 60:11 distinguish [1] - 37:10 distinguished [1] - 24:1 disturbing [1] - 17:21 DO [1] - 86:8 docket [8] - 3:2, 8:11, 8:14, 40:9, 51:24, 66:5, 71:17 dockets [2] - 5:18, 7:23 documentation [1] - 12:14 dollars [2] - 57:13 done [9] - 24:1, 24:2, 39:21, 55:3, 55:4, 62:5, 63:17, 64:10, 78:14 door [1] - 27:6 doubt [3] - 18:22, 68:14, 70:7 down [3] - 5:6, 14:15, 54:7 draw [2] - 19:6, 73:8 drivers [1] - 13:20 due [2] - 27:19, 38:1 duly [1] - 86:8 duly-appointed [1] - 86:8 during [5] - 23:13, 32:21, 41:11, 82:5, 83:1</p>	<p>61:2, 62:22, 65:7, 73:17 EL11-006 [1] - 3:2 electric [16] - 21:4, 40:1, 40:11, 40:15, 40:24, 41:20, 42:4, 50:23, 52:7, 68:15, 69:11, 69:16, 70:9, 70:11, 71:25, 72:1 electricity [1] - 44:24 elements [2] - 42:22, 59:25 eligible [2] - 35:18, 43:22 eliminate [1] - 57:2 eliminated [1] - 53:14 elsewhere [2] - 21:5, 53:2 Empire [1] - 51:3 encompasses [1] - 13:17 encourage [1] - 39:5 end [4] - 8:14, 34:9, 35:18, 58:16 ENERGY [2] - 1:4, 1:5 energy [8] - 8:12, 16:9, 26:25, 36:24, 36:25, 39:1, 43:18, 78:12 Energy [35] - 1:21, 3:3, 3:4, 4:14, 5:14, 6:2, 18:11, 18:20, 24:19, 24:21, 26:7, 27:6, 38:22, 39:8, 39:17, 39:21, 40:22, 40:24, 43:7, 45:14, 45:24, 46:22, 46:23, 47:12, 51:3, 69:23, 70:22, 71:1, 71:18, 77:18, 78:11, 78:15, 79:3, 79:7, 79:8 Energy's [7] - 23:22, 28:10, 30:21, 31:2, 40:23, 47:6, 69:25</p>	<p>ENTER [1] - 1:5 enter [7] - 3:4, 43:17, 43:23, 44:24, 46:2, 51:1, 59:15 Entergy [1] - 38:6 entirety [6] - 6:1, 9:14, 11:12, 25:19, 77:16, 83:25 entitled [4] - 2:7, 36:7, 49:12, 86:10 Environmental [1] - 15:14 equipment [1] - 67:25 error [2] - 69:1, 80:3 ES11-006 [1] - 1:4 especially [1] - 24:4 essential [1] - 55:22 establish [10] - 21:10, 50:18, 53:15, 54:1, 55:2, 55:23, 62:4, 62:17, 62:19, 69:24 established [5] - 9:2, 22:21, 25:15, 62:6, 79:6 establishment [2] - 7:18, 62:1 estimate [3] - 52:6, 52:9, 53:5 estimated [3] - 49:16, 52:3, 52:12 estimating [1] - 52:8 et [1] - 23:9 Evidence [1] - 13:2 evidence [19] - 10:14, 10:20, 13:8, 13:9, 36:1, 42:15, 48:17, 51:21, 51:23, 52:21, 58:7, 60:5, 61:3, 67:24, 69:9, 69:18, 70:20, 71:10, 74:17 evidenced [2] - 8:19, 76:16 exactly [2] - 16:4, 48:23 examination [2] - 52:22, 61:5 examined [1] - 55:13 example [8] - 15:11, 18:13, 21:25, 26:18, 60:23, 68:18, 68:25, 73:19 excellent [1] - 4:9 except [2] - 51:16, 84:17 exception [2] - 21:6, 30:24 excess [1] - 53:1 exclude [8] - 31:21, 33:15, 33:16, 66:25, 78:24, 82:7, 83:19,</p>	<p>83:21 Exclude [4] - 34:6, 34:24, 75:8, 80:17 excluded [2] - 68:19, 72:16 excluding [6] - 31:21, 33:13, 33:14, 77:4, 79:1, 82:12 excuse [8] - 5:21, 28:17, 56:7, 65:7, 67:4, 79:9 executed [2] - 45:9, 45:11 execution [1] - 54:15 exhibit [1] - 52:1 exhibits [1] - 47:6 existed [1] - 45:2 existence [1] - 77:9 existing [1] - 62:8 exists [1] - 72:20 expect [1] - 33:10 expense [3] - 18:8, 24:15, 25:3 expenses [5] - 5:22, 18:17, 18:19, 24:22, 25:1 expensive [2] - 16:3, 52:4 experience [10] - 10:16, 68:14, 68:22, 69:4, 70:3, 75:12, 75:17, 76:10, 77:8, 77:19 experiences [2] - 74:9, 75:4 expert [49] - 9:17, 10:5, 10:8, 10:11, 10:15, 10:19, 18:15, 20:14, 20:15, 21:3, 21:12, 23:11, 25:20, 26:3, 26:9, 27:23, 28:4, 42:1, 42:24, 67:11, 67:14, 67:18, 67:23, 68:2, 68:4, 68:16, 68:19, 68:21, 69:10, 70:8, 70:12, 70:14, 71:18, 72:1, 72:11, 72:13, 72:24, 74:8, 74:25, 75:13, 76:5, 77:5, 77:16, 77:18, 77:22, 77:25, 78:2 expert's [4] - 9:20, 67:15, 72:4, 78:3 expertise [2] - 69:6, 70:10 experts [7] - 8:13, 11:1, 15:7, 21:7, 42:2, 69:5, 70:1 explain [2] - 18:4,</p>	<p>59:13 explained [2] - 23:25, 45:4 explains [1] - 52:2 explanation [2] - 12:18, 58:21 explore [3] - 23:17, 24:4, 24:7 explored [1] - 25:23 exposition [1] - 51:7 expression [1] - 73:7 extensive [3] - 12:11, 12:14, 75:16 extensively [1] - 69:7 extent [2] - 58:8, 76:19 extraordinarily [1] - 43:6 extreme [1] - 60:17 extremely [1] - 66:4</p>
E				F
<p>e-mail [2] - 29:17, 30:4 E2010.7.77 [1] - 71:17 East [1] - 2:8 eastern [5] - 6:13, 13:16, 13:23, 14:2, 14:5 echo [1] - 49:24 education [4] - 10:16, 75:12, 76:10, 77:20 effect [1] - 76:3 efforts [1] - 23:17 either [9] - 8:19, 8:22, 36:23, 51:5, 59:4,</p>	<p>enforceable [35] - 16:22, 17:16, 19:19, 19:25, 21:23, 22:4, 22:11, 22:15, 25:5, 25:14, 25:22, 26:4, 29:6, 36:13, 36:22, 36:25, 42:9, 43:6, 43:18, 43:20, 44:2, 44:11, 44:15, 44:19, 45:2, 45:8, 48:7, 48:15, 56:9, 57:12, 59:7, 60:10, 63:21, 73:20, 79:5 enforcement [2] - 46:11, 53:20 engage [1] - 18:24</p>			<p>F.3d [3] - 38:6, 50:8, 56:2 faced [1] - 12:17 facilities [1] - 43:11 facility [10] - 19:22, 26:25, 36:23, 41:1, 43:17, 43:22, 43:24, 48:20, 60:14, 61:21 facility's [1] - 26:20 fact [28] - 8:8, 10:13, 10:14, 10:21, 16:6, 17:24, 18:18, 19:5, 21:21, 27:22, 29:3, 33:14, 36:1, 36:6, 46:13, 47:23, 51:8, 59:16, 60:7, 68:15, 69:13, 70:24, 73:4, 73:5, 73:7, 77:23, 78:11, 80:7 fact-finding [1] - 19:5 factor [1] - 76:8 factoring [1] - 52:10 factors [2] - 9:18, 69:2 facts [5] - 21:22, 22:2, 45:15, 58:6, 68:6 factual [1] - 56:5 factually [1] - 51:11 failed [1] - 20:16 fails [1] - 59:17 failure [2] - 17:23, 35:11 fair [3] - 25:10, 30:14, 30:15 fairly [1] - 3:19 faith [5] - 8:24, 9:4, 25:10, 25:17, 27:24</p>

<p>fall [1] - 73:17 false [1] - 8:11 far [4] - 42:2, 47:15, 49:10, 53:1 fashion [1] - 74:8 favor [4] - 32:1, 66:17, 84:2, 84:24 February [7] - 17:18, 26:18, 36:14, 42:8, 46:24, 56:9, 63:7 federal [8] - 15:17, 21:13, 41:22, 43:7, 46:10, 47:21, 50:13, 55:24 Federal [1] - 36:17 federally [1] - 38:14 felt [1] - 29:23 FERC [39] - 17:2, 17:4, 19:17, 19:18, 20:25, 21:11, 21:13, 21:15, 22:2, 22:4, 22:8, 22:16, 37:19, 39:6, 43:5, 43:15, 43:16, 43:25, 44:3, 44:21, 46:7, 46:10, 46:15, 46:21, 48:6, 48:18, 49:22, 53:19, 53:23, 54:7, 60:13, 60:18, 61:10, 62:3, 65:10, 73:21, 73:22, 73:23, 74:14 FERC's [4] - 44:5, 48:15, 48:17, 53:12 Fiegen [12] - 1:11, 31:5, 31:8, 31:23, 32:23, 66:21, 82:3, 83:22, 84:6, 84:11, 84:22, 85:3 Fiegen [12] - 31:15, 31:17, 32:22, 32:23, 66:20, 66:21, 82:2, 82:23, 84:5, 84:10, 85:2, 85:3 field [1] - 21:12 fields [1] - 70:8 fifth [2] - 50:7 Fifth [3] - 38:4, 56:3, 59:12 file [6] - 10:3, 35:10, 36:5, 41:14, 47:24, 55:11 filed [11] - 3:25, 10:4, 20:11, 24:21, 25:8, 25:13, 26:18, 32:4, 45:20, 52:16, 55:9 final [3] - 29:25, 33:10, 40:8 finally [8] - 5:24, 7:5, 9:12, 10:24, 25:18, 27:25, 51:19, 78:22</p>	<p>financing [3] - 37:8, 39:1, 63:16 fine [1] - 81:12 fire [1] - 13:18 firm [3] - 45:6, 45:11, 63:6 firms [1] - 42:1 first [32] - 3:25, 4:2, 5:17, 6:2, 6:4, 9:15, 11:22, 12:1, 19:20, 20:13, 23:5, 23:16, 34:20, 34:21, 34:23, 36:10, 46:10, 48:19, 49:11, 50:4, 51:25, 53:9, 54:18, 56:17, 56:23, 57:24, 67:3, 67:18, 80:17, 82:18, 83:22 firstly [1] - 13:15 Fischer [1] - 75:9 fit [1] - 73:21 five [4] - 37:17, 59:8, 68:5, 74:13 five-year [1] - 59:8 fixed [1] - 38:15 flawed [1] - 40:10 flaws [1] - 69:20 focus [1] - 69:3 folks [1] - 32:5 follow [1] - 30:8 followed [1] - 47:23 following [1] - 33:5 FOR [1] - 1:5 forced [4] - 35:10, 50:13, 50:15 forecast [49] - 33:25, 36:11, 39:12, 39:20, 40:2, 40:5, 40:6, 40:7, 40:11, 40:15, 40:16, 40:24, 41:18, 41:20, 41:21, 41:23, 42:5, 42:7, 42:13, 42:20, 42:21, 42:23, 49:13, 51:8, 51:12, 52:18, 52:25, 59:19, 59:21, 59:24, 59:25, 60:1, 60:8, 64:4, 64:9, 64:11, 64:17, 64:20, 69:22, 70:16, 71:2, 71:4, 71:18, 71:20, 71:25, 78:14, 78:18, 78:19 forecasting [4] - 69:11, 69:12, 72:2, 75:19 forecasts [4] - 42:4, 69:15, 70:11, 75:25 foremost [1] - 6:4 form [3] - 10:17, 30:4, 72:24</p>	<p>formal [1] - 29:21 formation [1] - 21:14 forth [4] - 9:9, 26:11, 28:2, 78:9 foundation [2] - 67:20, 69:8 fourth [1] - 55:12 frame [1] - 30:17 framework [1] - 27:3 frankly [1] - 58:4 free [2] - 46:19, 55:17 front [7] - 21:2, 21:13, 22:13, 29:4, 78:15, 82:5, 83:16 frustrated [1] - 58:4 fulfill [1] - 18:13 full [1] - 26:1, 26:4, 36:11, 39:18, 39:19, 40:13, 42:12, 42:14, 42:15, 60:3, 83:20 full-blown [1] - 26:1 fully [10] - 25:23, 35:17, 38:15, 45:9, 45:11, 55:8, 56:21, 58:10, 65:15, 66:2 fundamental [5] - 14:8, 14:21, 14:25, 16:4, 69:4 furthermore [2] - 68:7, 71:1 future [2] - 32:19, 78:13</p> <p style="text-align: center;">G</p> <p>gained [1] - 39:3 game [1] - 26:3 GARY [1] - 1:12 Gary [1] - 82:23 gas [11] - 13:18, 13:19, 13:22, 13:24, 13:25, 14:1, 40:16, 50:23, 69:11, 69:16 gases [1] - 15:15 general [3] - 69:1, 70:8, 80:24 generally [1] - 73:4 generate [3] - 51:8, 51:11, 54:10 generation [1] - 13:18 generator [1] - 52:5 genuine [1] - 36:6 given [5] - 10:2, 47:1, 53:3, 56:5, 62:8, 77:5 governing [1] - 15:20 governs [1] - 75:13 grant [2] - 31:2, 37:20 grapple [1] - 53:11</p>	<p>Green's [1] - 52:1 greenhouse [1] - 15:14 Greg [1] - 1:16 Gregg [1] - 1:19 ground [1] - 66:8 grounds [1] - 82:12 group [2] - 56:1, 71:14 growth [1] - 52:10 guaranteed [1] - 38:14 guess [7] - 5:4, 7:24, 27:14, 30:8, 50:10, 57:22, 76:12 guidance [2] - 10:11, 46:16 guideline [1] - 68:25 Gulf [1] - 38:6 Guthrie [1] - 10:25</p> <p style="text-align: center;">H</p> <p>hac [1] - 33:18 half [1] - 35:15 handle [2] - 34:5, 34:12 handling [1] - 34:16 handset [4] - 49:9, 49:20, 49:24, 62:11 handwriting [1] - 73:16 HANSON [24] - 1:12, 4:7, 29:13, 30:2, 30:15, 31:13, 31:15, 32:3, 32:15, 33:7, 33:12, 63:24, 64:1, 64:21, 64:25, 65:5, 65:18, 65:25, 66:2, 66:19, 82:22, 83:14, 84:4, 85:1 Hanson [13] - 4:6, 30:12, 31:14, 31:24, 32:2, 33:1, 33:2, 63:25, 64:5, 66:18, 82:23, 84:3, 84:25 Harbert [1] - 9:16 hear [10] - 11:20, 11:23, 29:23, 49:4, 49:8, 58:6, 58:7, 62:9, 62:12, 62:13 heard [4] - 28:18, 33:9, 58:15, 67:9 hearing [16] - 33:6, 33:9, 35:13, 42:17, 57:2, 57:6, 57:23, 58:6, 60:6, 61:2, 61:16, 66:4, 66:7, 76:6, 82:5, 83:1 height [1] - 73:11 held [1] - 2:6</p>	<p>help [2] - 10:8, 84:11 6 helpful [2] - 30:3, 73:2 helps [1] - 34:17 hence [2] - 57:14 HEREBY [1] - 86:8 high [1] - 14:1 higher [1] - 15:25 highly [1] - 14:4 hire [1] - 8:12 hired [1] - 18:14 history [1] - 50:25 hold [3] - 56:20, 58:9, 81:5 holdings [1] - 43:25 hope [1] - 35:13 hour [1] - 51:17 hourly [1] - 52:3</p> <p style="text-align: center;">I</p> <p>Idaho [6] - 44:7, 44:8, 44:17, 44:23, 45:8, 46:17 idea [2] - 18:10, 22:13 identify [1] - 70:2 identity [1] - 73:11 illusory [1] - 54:19 imbalance [2] - 19:15, 19:16 immediate [1] - 61:14 imminent [1] - 21:18 impact [2] - 51:12, 57:13 impermissible [1] - 54:11 implement [1] - 62:15 implemented [1] - 48:18 implementing [3] - 17:4, 19:18, 43:15 implying [1] - 8:10 import [1] - 58:25 important [7] - 16:17, 20:20, 38:24, 51:15, 53:22, 66:4, 66:5 importantly [2] - 14:20, 52:12 impose [2] - 44:4, 60:19 imposed [1] - 44:23 impression [1] - 56:17 improper [1] - 20:11 IN [1] - 1:4 inaccuracies [1] - 52:24 inaccurate [3] - 12:6, 42:6, 81:1 inadmissibility [1] - 27:20</p>
---	---	---	--	--

<p>inadmissible [1] - 6:6</p> <p>inapplicable [1] - 23:24</p> <p>Inc [3] - 38:8, 56:1, 67:25</p> <p>incentive [5] - 17:25, 18:8, 18:21, 19:14, 45:22</p> <p>inception [1] - 9:25</p> <p>include [3] - 31:20, 42:22, 75:18</p> <p>included [2] - 36:9, 83:3</p> <p>including [3] - 12:13, 31:20, 39:6</p> <p>incomplete [1] - 42:21</p> <p>inconceivable [1] - 13:3</p> <p>inconsistent [1] - 23:17</p> <p>inconvenience [1] - 81:21</p> <p>incorporated [1] - 72:4</p> <p>incorrect [2] - 45:7, 74:13</p> <p>incremental [7] - 40:2, 40:5, 47:15, 52:8, 52:10, 52:12, 55:19</p> <p>incurred [13] - 17:16, 22:15, 36:13, 37:24, 42:9, 44:12, 44:15, 44:19, 48:6, 53:9, 53:12, 56:8, 65:10</p> <p>incurs [1] - 18:11</p> <p>indeed [5] - 16:17, 18:14, 20:20, 59:25, 60:14</p> <p>indicated [1] - 32:10</p> <p>individual [1] - 53:10</p> <p>individuals [1] - 42:1</p> <p>industry [8] - 13:15, 21:4, 68:15, 70:9, 70:19, 71:9, 71:14</p> <p>inexorable [1] - 42:11</p> <p>inference [2] - 73:8, 73:10</p> <p>inferences [2] - 72:25, 73:1</p> <p>inferred [1] - 7:14</p> <p>inflammatory [2] - 8:4, 17:12</p> <p>information [20] - 12:10, 12:15, 13:1, 13:4, 23:24, 24:3, 24:10, 29:14, 29:24, 30:16, 32:16, 32:19, 41:12, 41:15, 42:7, 64:16, 69:22, 70:15, 75:24</p>	<p>initial [4] - 10:1, 50:5, 50:22</p> <p>initiate [2] - 46:11, 53:19</p> <p>innovative [1] - 67:25</p> <p>input [3] - 14:12, 22:21, 69:25</p> <p>inputs [1] - 78:4</p> <p>inquiries [1] - 45:18</p> <p>insert [1] - 50:25</p> <p>inserting [1] - 41:3</p> <p>instance [6] - 6:12, 16:14, 24:20, 70:16, 70:24, 77:25</p> <p>instances [2] - 70:22, 71:12</p> <p>instead [2] - 68:22, 78:12</p> <p>integrated [2] - 7:2, 7:4</p> <p>intended [1] - 43:20</p> <p>intent [1] - 17:13</p> <p>interconnect [10] - 6:14, 13:16, 13:23, 13:24, 14:2, 14:3, 14:4, 14:5</p> <p>interconnections [1] - 23:8</p> <p>interconnects [2] - 13:21, 13:24</p> <p>interest [3] - 51:3, 67:6, 75:14</p> <p>interested [2] - 17:3, 22:22</p> <p>interfere [1] - 37:7</p> <p>interfering [1] - 59:15</p> <p>interject [1] - 41:2</p> <p>internet [1] - 29:16</p> <p>interpret [1] - 44:9</p> <p>interpretation [5] - 27:2, 38:23, 46:18, 53:17, 74:6</p> <p>interpretations [1] - 54:9</p> <p>interpreting [1] - 10:22</p> <p>interrogation [1] - 68:22</p> <p>Interrogatories [1] - 36:4</p> <p>interrupt [2] - 4:16, 63:18</p> <p>interrupting [1] - 31:16</p> <p>intertwined [1] - 57:5</p> <p>INTO [1] - 1:5</p> <p>introduced [2] - 19:12</p> <p>invalidated [1] - 38:10</p> <p>invest [1] - 60:25</p> <p>involve [1] - 50:9</p>	<p>involved [1] - 74:18</p> <p>involves [1] - 55:16</p> <p>irrelevance [1] - 27:20</p> <p>irrelevant [10] - 6:6, 7:18, 7:19, 8:8, 8:25, 19:10, 23:7, 24:3, 24:5, 60:13</p> <p>irretrievable [1] - 60:22</p> <p>ISO [1] - 60:24</p> <p>issue [60] - 5:8, 5:24, 8:8, 9:2, 9:5, 9:20, 9:24, 10:5, 10:6, 10:7, 10:15, 10:21, 10:23, 11:5, 11:6, 15:19, 16:19, 17:15, 21:8, 21:14, 21:24, 22:9, 22:10, 22:18, 22:20, 22:23, 23:5, 25:5, 25:6, 26:1, 28:17, 28:20, 36:6, 36:16, 42:18, 42:25, 43:2, 44:8, 47:10, 47:18, 47:19, 47:20, 49:11, 53:8, 55:7, 55:13, 57:12, 57:15, 58:18, 59:18, 60:11, 61:18, 62:1, 62:16, 73:4, 79:5</p> <p>issues [27] - 16:16, 17:14, 21:7, 23:4, 24:7, 26:4, 31:12, 35:8, 36:1, 36:2, 36:8, 53:3, 53:4, 56:16, 56:17, 56:22, 57:2, 57:5, 57:24, 58:10, 59:11, 61:7, 61:21, 63:13, 66:24</p> <p>items [1] - 80:18</p> <p>itself [6] - 36:21, 51:9, 55:17, 57:6, 60:15, 61:12</p>	<p>justified [1] - 78:3</p> <p>justify [2] - 40:19, 40:22</p>	<p>81:22</p> <p>latter [1] - 37:25</p> <p>Lauckhart [16] - 5:18, 6:4, 12:1, 14:18, 15:6, 16:12, 16:20, 23:6, 27:18, 30:22, 42:3, 42:17, 52:23, 64:23, 65:3, 69:20</p> <p>Lauckhart's [17] - 6:4, 7:21, 11:23, 12:9, 12:12, 12:16, 13:5, 15:5, 27:18, 42:7, 42:24, 51:20, 52:18, 52:24, 71:5, 74:1</p> <p>law [15] - 7:17, 10:22, 16:21, 34:1, 36:2, 36:7, 39:15, 41:22, 50:13, 51:9, 59:9, 62:7, 72:12, 72:21, 80:1</p> <p>Law [1] - 74:10</p> <p>lawyer [1] - 82:8</p> <p>lay [16] - 24:17, 72:14, 72:17, 72:22, 73:5, 73:6, 73:8, 73:11, 73:15, 74:8, 75:3, 76:13, 76:16, 79:4, 79:24</p> <p>layperson's [1] - 76:22</p> <p>leading [1] - 79:11</p> <p>least [5] - 31:21, 39:3, 74:20, 77:22, 77:25</p> <p>leave [2] - 53:21, 79:21</p> <p>leaves [1] - 46:12</p> <p>leeway [2] - 30:18, 32:20</p> <p>left [3] - 26:13, 53:10, 58:2</p> <p>legal [24] - 11:1, 20:23, 21:7, 24:19, 24:25, 26:8, 26:10, 28:4, 53:3, 55:6, 55:7, 56:5, 56:22, 58:8, 72:11, 72:20, 74:7, 74:15, 75:1, 80:9, 80:25, 82:10, 82:11, 82:13</p> <p>legally [35] - 16:22, 17:16, 19:19, 19:25, 21:23, 22:4, 22:11, 22:15, 25:5, 25:14, 25:22, 26:4, 29:5, 36:13, 36:22, 36:24, 42:9, 43:6, 43:18, 44:2, 44:11, 44:15, 44:19, 45:2, 45:8, 48:6, 48:15, 56:8, 57:11, 59:7, 60:10,</p>
			K	
			<p>K-O-P [1] - 41:7</p> <p>Kara [3] - 1:15, 56:15, 65:7</p> <p>Karen [1] - 1:14</p> <p>keep [1] - 50:15</p> <p>key [1] - 17:14</p> <p>kind [7] - 4:7, 4:9, 6:23, 50:18, 64:19, 71:10, 76:12</p> <p>knowledge [9] - 10:13, 10:15, 24:18, 67:17, 69:3, 73:12, 74:21, 75:12, 77:19</p> <p>knows [3] - 17:15, 42:3, 43:10</p> <p>Kop [3] - 40:22, 61:13, 64:10</p> <p>KRISTIE [1] - 1:11</p> <p>Kytec [1] - 67:25</p>	
			L	
			<p>lack [2] - 62:8, 77:16</p> <p>lacking [2] - 58:3</p> <p>LaFave [22] - 15:7, 18:23, 20:22, 26:6, 26:17, 26:23, 27:8, 72:10, 72:11, 72:13, 72:18, 74:5, 74:7, 74:17, 74:21, 74:25, 76:11, 76:16, 79:6, 79:22, 80:4, 80:25</p> <p>LaFave's [17] - 27:10, 52:8, 64:8, 72:15, 73:16, 74:11, 76:14, 76:21, 77:6, 78:22, 79:1, 79:23, 80:13, 80:19, 82:4, 83:21, 84:13</p> <p>LaFrentz [2] - 2:2, 3:8</p> <p>LAFRENTZ [2] - 3:9, 3:11</p> <p>laid [1] - 8:23</p> <p>land [1] - 10:23</p> <p>language [3] - 38:19, 45:7, 45:17</p> <p>large [2] - 13:19, 35:15</p> <p>last [11] - 3:2, 5:23, 8:6, 9:12, 16:19, 22:9, 24:14, 25:3, 28:11, 66:24, 83:16</p> <p>late [3] - 20:11, 26:3,</p>	
		J		
		<p>January [2] - 56:24, 57:24</p> <p>JD [8] - 43:25, 44:23, 45:1, 46:6, 53:13, 53:18, 53:23, 54:8</p> <p>John [2] - 1:13, 84:11</p> <p>jon [1] - 1:18</p> <p>judge [1] - 78:18</p> <p>judgment [1] - 36:7</p> <p>judicial [1] - 29:2</p> <p>junction [1] - 83:2</p> <p>June [1] - 45:19</p> <p>jury [3] - 19:5, 19:8, 28:12</p>		

<p>63:20, 73:20, 74:13, 79:5 legislative [1] - 28:24 Lemler [1] - 68:10 length [5] - 40:14, 49:17, 50:19, 50:20, 51:6 lenient [1] - 13:2 LEO [47] - 7:18, 9:2, 9:24, 10:7, 10:23, 11:6, 17:1, 21:8, 21:14, 22:20, 26:21, 34:1, 43:2, 43:12, 44:8, 45:13, 46:9, 46:18, 46:19, 47:10, 47:17, 53:9, 53:11, 53:15, 53:24, 54:1, 54:4, 54:10, 54:16, 54:18, 55:2, 55:13, 55:15, 55:23, 61:19, 62:1, 62:7, 63:2, 63:6, 63:11, 63:13, 63:19, 65:10, 72:20, 73:23, 74:2, 74:4 less [2] - 16:11, 40:5 lesser [1] - 55:20 letter [3] - 29:21, 47:23, 47:25 letters [1] - 45:15 Lewis [19] - 15:8, 52:6, 68:12, 68:14, 69:10, 69:22, 69:24, 70:4, 70:8, 72:8, 75:17, 75:21, 75:22, 77:21, 78:9, 78:12, 78:20, 79:18, 83:20 Lewis's [23] - 69:8, 69:14, 69:19, 69:21, 70:3, 70:16, 70:23, 70:24, 71:2, 71:3, 71:12, 71:15, 71:20, 71:24, 75:8, 75:15, 75:20, 76:2, 76:21, 77:16, 77:24, 78:7, 83:24 liability [1] - 69:4 lies [1] - 68:8 light [1] - 43:7 likewise [2] - 38:8, 54:12 limit [3] - 40:11, 44:18, 75:3 limited [5] - 44:8, 69:5, 72:17, 72:25, 74:9 Limited [1] - 51:3 line [16] - 3:7, 3:9, 3:11, 3:14, 4:18, 26:19, 26:23, 73:19, 80:18, 80:20, 81:11,</p>	<p>82:17, 84:20, 84:21 lines [5] - 5:1, 6:9, 7:13, 82:18, 84:14 listening [1] - 83:7 litigation [10] - 5:22, 8:5, 8:7, 18:9, 24:13, 24:14, 24:15, 24:22 LLC [4] - 1:4, 3:3, 53:13 load [7] - 6:20, 6:21, 6:22, 6:24, 52:3, 52:4, 52:10 located [1] - 35:16 Lockport's [1] - 51:2 logic [6] - 18:7, 39:11, 39:16, 42:11, 45:21, 51:10 logical [3] - 47:5, 47:7, 73:9 long-term [12] - 36:16, 37:21, 38:15, 39:5, 39:12, 39:23, 40:5, 41:22, 42:5, 59:1, 59:16, 70:10 look [6] - 6:24, 21:16, 45:15, 76:9, 81:16, 81:17 looked [2] - 16:12, 28:21 looking [3] - 30:3, 81:9, 82:17 losing [1] - 61:15 loud [2] - 11:20, 49:5 LP [1] - 50:23</p>	<p>market [15] - 6:15, 6:23, 13:20, 14:3, 14:4, 14:21, 23:9, 51:16, 52:3, 52:7, 52:12, 60:23, 75:25, 78:13 markets [3] - 6:16, 6:18, 6:25 massive [1] - 57:13 match [1] - 65:10 material [1] - 36:6 matter [20] - 2:7, 3:3, 5:5, 10:21, 21:22, 22:2, 22:19, 28:14, 34:1, 36:7, 39:11, 39:15, 39:16, 51:9, 51:10, 62:7, 75:13, 77:18, 80:13, 86:10 MATTER [1] - 1:4 matters [2] - 4:13, 78:23 maximum [1] - 52:13 MCCOMSEY [1] - 86:5 McComsey [2] - 1:24, 86:18 mean [7] - 17:17, 21:5, 32:7, 46:15, 68:16, 79:19, 82:4 meaning [1] - 58:21 means [1] - 37:2 meeting [1] - 83:4 meets [1] - 68:8 megawatt [2] - 16:10, 35:15 Mehlhaff [1] - 1:17 member [1] - 65:8 mention [1] - 19:4 mentioned [5] - 47:8, 62:2, 62:5, 70:17, 75:10 merely [4] - 10:22, 43:23, 72:14, 76:14 met [1] - 68:11 method [11] - 37:25, 67:15, 70:18, 70:19, 70:23, 70:24, 71:9, 71:12, 71:15, 72:2 methodology [7] - 16:15, 40:7, 40:16, 69:19, 69:21, 77:24, 78:5 methods [3] - 68:5, 76:2, 76:8 Michael [2] - 5:21, 8:3 might [8] - 11:19, 14:15, 20:18, 22:19, 41:2, 56:11, 58:1, 63:18 Mike [2] - 2:2, 3:10 mind [4] - 35:22,</p>	<p>50:16, 63:12, 71:22 minds [1] - 19:8 minute [1] - 37:9 misapprehends [1] - 17:12 mischaracterizes [1] - 75:20 MISO [2] - 6:15, 60:23 misplaced [1] - 57:20 missing [1] - 60:1 misunderstands [1] - 47:17 model [1] - 52:19 modified [1] - 14:24 moment [1] - 4:17 money [1] - 60:25 Montana [56] - 5:19, 6:5, 6:11, 6:14, 6:15, 6:17, 6:19, 6:23, 6:24, 7:2, 7:7, 7:9, 7:11, 7:15, 7:17, 7:22, 12:3, 12:20, 12:23, 13:17, 14:7, 14:9, 14:11, 14:22, 15:1, 15:11, 15:16, 15:20, 16:2, 16:8, 16:10, 16:13, 16:21, 23:7, 23:22, 24:1, 39:3, 40:8, 40:17, 40:19, 40:21, 45:25, 60:15, 61:13, 64:10, 70:1, 70:25, 71:3, 71:16, 71:19, 72:6, 74:22, 77:24, 78:1, 78:16 month [2] - 64:24, 65:1 months [6] - 56:23, 57:1, 57:25, 64:12, 64:13 moreover [1] - 7:17 most [5] - 6:21, 14:19, 52:4, 52:19, 54:22 motion [21] - 5:15, 9:9, 30:13, 31:4, 32:25, 36:3, 47:10, 50:22, 56:8, 66:11, 66:12, 66:22, 72:11, 84:1, 84:7, 84:9, 84:12, 84:13, 84:23, 85:4 Motion [27] - 3:24, 4:15, 4:21, 4:23, 5:5, 5:15, 5:25, 25:18, 30:21, 30:23, 31:2, 31:10, 34:6, 34:15, 34:17, 34:23, 34:24, 36:9, 41:14, 41:17, 53:7, 55:10, 75:8, 78:7, 78:22, 80:17,</p>	<p>84:16 Motions [1] - 34:6 motions [15] - 4:4, 27:18, 28:11, 29:12, 29:21, 31:9, 33:22, 34:2, 34:14, 48:25, 61:11, 65:24, 66:25, 77:1, 83:13 motivation [1] - 20:4 motivations [1] - 18:4 mountain [1] - 32:9 move [9] - 3:1, 7:24, 8:2, 14:9, 30:20, 33:22, 66:13, 83:23, 84:12 moved [2] - 13:25, 84:22 MR [51] - 3:13, 3:15, 11:17, 11:22, 12:1, 14:17, 17:11, 20:9, 23:2, 28:16, 28:20, 29:19, 32:7, 33:1, 33:8, 33:14, 34:4, 34:22, 41:4, 41:7, 41:9, 43:5, 49:3, 49:6, 49:11, 49:21, 50:3, 58:14, 62:10, 62:14, 63:12, 63:20, 64:5, 64:23, 65:2, 67:3, 67:8, 71:8, 77:13, 79:15, 80:23, 81:5, 81:9, 81:12, 81:14, 81:19, 82:7, 82:15, 82:19, 84:15, 84:20 MS [13] - 3:9, 3:11, 4:12, 4:20, 5:4, 5:12, 8:2, 9:12, 27:14, 34:11, 56:15, 65:12, 75:7 multiple [2] - 27:15 must [18] - 24:15, 25:4, 45:10, 48:5, 53:25, 54:5, 55:15, 67:11, 67:15, 67:18, 67:23, 68:3, 69:3, 70:19, 71:10, 72:16, 73:12, 74:9 mute [4] - 3:15, 5:1, 11:17, 58:15 mystery [1] - 15:17</p>
M				
<p>mail [2] - 29:17, 30:4 main [1] - 77:3 majority [2] - 26:12, 55:13 Makens [13] - 5:21, 8:3, 8:10, 8:23, 9:8, 17:7, 17:11, 21:25, 24:13, 24:17, 30:24, 52:23 Makens' [6] - 8:24, 9:3, 17:13, 17:21, 17:24, 27:21 maker [1] - 29:2 Management [1] - 37:13 mandatory [1] - 7:6 March [6] - 1:8, 2:9, 55:9, 55:10, 86:11, 86:14 margin [1] - 13:18 marginal [2] - 52:4, 52:11</p>		<p>member [1] - 65:8 mention [1] - 19:4 mentioned [5] - 47:8, 62:2, 62:5, 70:17, 75:10 merely [4] - 10:22, 43:23, 72:14, 76:14 met [1] - 68:11 method [11] - 37:25, 67:15, 70:18, 70:19, 70:23, 70:24, 71:9, 71:12, 71:15, 72:2 methodology [7] - 16:15, 40:7, 40:16, 69:19, 69:21, 77:24, 78:5 methods [3] - 68:5, 76:2, 76:8 Michael [2] - 5:21, 8:3 might [8] - 11:19, 14:15, 20:18, 22:19, 41:2, 56:11, 58:1, 63:18 Mike [2] - 2:2, 3:10 mind [4] - 35:22,</p>	<p>50:16, 63:12, 71:22 minds [1] - 19:8 minute [1] - 37:9 misapprehends [1] - 17:12 mischaracterizes [1] - 75:20 MISO [2] - 6:15, 60:23 misplaced [1] - 57:20 missing [1] - 60:1 misunderstands [1] - 47:17 model [1] - 52:19 modified [1] - 14:24 moment [1] - 4:17 money [1] - 60:25 Montana [56] - 5:19, 6:5, 6:11, 6:14, 6:15, 6:17, 6:19, 6:23, 6:24, 7:2, 7:7, 7:9, 7:11, 7:15, 7:17, 7:22, 12:3, 12:20, 12:23, 13:17, 14:7, 14:9, 14:11, 14:22, 15:1, 15:11, 15:16, 15:20, 16:2, 16:8, 16:10, 16:13, 16:21, 23:7, 23:22, 24:1, 39:3, 40:8, 40:17, 40:19, 40:21, 45:25, 60:15, 61:13, 64:10, 70:1, 70:25, 71:3, 71:16, 71:19, 72:6, 74:22, 77:24, 78:1, 78:16 month [2] - 64:24, 65:1 months [6] - 56:23, 57:1, 57:25, 64:12, 64:13 moreover [1] - 7:17 most [5] - 6:21, 14:19, 52:4, 52:19, 54:22 motion [21] - 5:15, 9:9, 30:13, 31:4, 32:25, 36:3, 47:10, 50:22, 56:8, 66:11, 66:12, 66:22, 72:11, 84:1, 84:7, 84:9, 84:12, 84:13, 84:23, 85:4 Motion [27] - 3:24, 4:15, 4:21, 4:23, 5:5, 5:15, 5:25, 25:18, 30:21, 30:23, 31:2, 31:10, 34:6, 34:15, 34:17, 34:23, 34:24, 36:9, 41:14, 41:17, 53:7, 55:10, 75:8, 78:7, 78:22, 80:17,</p>	<p>84:16 Motions [1] - 34:6 motions [15] - 4:4, 27:18, 28:11, 29:12, 29:21, 31:9, 33:22, 34:2, 34:14, 48:25, 61:11, 65:24, 66:25, 77:1, 83:13 motivation [1] - 20:4 motivations [1] - 18:4 mountain [1] - 32:9 move [9] - 3:1, 7:24, 8:2, 14:9, 30:20, 33:22, 66:13, 83:23, 84:12 moved [2] - 13:25, 84:22 MR [51] - 3:13, 3:15, 11:17, 11:22, 12:1, 14:17, 17:11, 20:9, 23:2, 28:16, 28:20, 29:19, 32:7, 33:1, 33:8, 33:14, 34:4, 34:22, 41:4, 41:7, 41:9, 43:5, 49:3, 49:6, 49:11, 49:21, 50:3, 58:14, 62:10, 62:14, 63:12, 63:20, 64:5, 64:23, 65:2, 67:3, 67:8, 71:8, 77:13, 79:15, 80:23, 81:5, 81:9, 81:12, 81:14, 81:19, 82:7, 82:15, 82:19, 84:15, 84:20 MS [13] - 3:9, 3:11, 4:12, 4:20, 5:4, 5:12, 8:2, 9:12, 27:14, 34:11, 56:15, 65:12, 75:7 multiple [2] - 27:15 must [18] - 24:15, 25:4, 45:10, 48:5, 53:25, 54:5, 55:15, 67:11, 67:15, 67:18, 67:23, 68:3, 69:3, 70:19, 71:10, 72:16, 73:12, 74:9 mute [4] - 3:15, 5:1, 11:17, 58:15 mystery [1] - 15:17</p>
M				
				N
				<p>n.5(2000) [1] - 38:6 N.W.2d [3] - 68:1, 68:10, 68:18 name [1] - 41:3 narrower [1] - 54:13</p>

<p>national [1] - 41:25 natural [6] - 13:18, 13:19, 13:22, 40:16, 69:11, 69:16 nature [1] - 82:9 near [1] - 6:15 necessarily [4] - 23:24, 26:2, 50:15, 79:1 necessary [6] - 55:2, 55:5, 62:17, 65:9, 70:18, 71:8 necessity [1] - 52:2 need [15] - 4:9, 14:13, 15:21, 20:2, 29:23, 35:19, 42:17, 47:24, 49:20, 50:15, 57:24, 58:6, 58:7, 61:13, 81:6 needed [3] - 39:5, 58:12, 79:14 needs [6] - 10:8, 15:3, 21:10, 24:2, 24:7, 35:16 negotiate [10] - 17:25, 18:22, 19:14, 35:5, 35:7, 37:21, 38:15, 45:16, 45:23, 48:5 negotiated [1] - 76:17 negotiation [5] - 9:1, 19:13, 25:12, 25:13, 79:11 negotiations [14] - 8:25, 9:4, 17:23, 18:4, 18:5, 18:25, 25:6, 25:10, 25:17, 27:25, 35:12, 41:11, 45:23, 77:8 Nelson [9] - 4:12, 5:12, 31:6, 32:24, 49:8, 49:23, 75:7, 84:7, 85:4 nelson [1] - 66:22 NELSON [76] - 1:11, 3:1, 3:10, 3:12, 3:17, 4:9, 4:16, 4:24, 5:9, 8:1, 9:10, 11:14, 11:19, 11:25, 14:15, 17:8, 20:8, 22:25, 27:12, 28:7, 28:19, 29:10, 30:11, 30:20, 31:7, 31:11, 31:14, 31:25, 32:6, 32:22, 32:24, 33:20, 34:7, 34:18, 41:2, 41:5, 41:8, 43:4, 49:1, 49:4, 49:10, 49:19, 50:1, 56:12, 58:11, 61:23, 62:13, 63:3, 63:18, 63:22, 63:25,</p>	<p>65:22, 66:1, 66:12, 66:20, 66:22, 67:7, 75:5, 77:11, 79:13, 80:14, 81:3, 81:7, 81:17, 81:25, 82:17, 82:20, 83:12, 83:18, 84:1, 84:5, 84:7, 84:19, 84:23, 85:2, 85:4 never [10] - 18:5, 18:24, 20:13, 20:15, 20:19, 34:24, 46:8, 46:22, 47:13, 74:21 New [2] - 50:22, 51:1 new [3] - 14:10, 50:6, 66:8 next [12] - 3:1, 3:2, 25:9, 26:7, 39:8, 39:17, 41:24, 51:7, 54:17, 74:1, 78:6, 82:18 Niagara [1] - 51:3 noise [3] - 4:18, 4:25, 11:18 none [11] - 11:16, 20:8, 29:12, 32:1, 50:17, 61:7, 65:24, 66:17, 70:17, 84:2, 84:24 North [2] - 13:25 Northwest [14] - 24:18, 26:7, 39:8, 39:17, 40:24, 45:14, 46:22, 46:23, 47:6, 69:23, 69:25, 70:22, 71:1, 71:17 Northwestern [125] - 1:21, 2:3, 3:4, 4:14, 4:22, 5:14, 6:2, 6:11, 7:9, 7:20, 8:10, 8:14, 8:22, 9:4, 9:7, 9:13, 9:23, 10:18, 10:24, 11:4, 11:8, 11:9, 11:10, 12:3, 12:19, 14:23, 15:12, 16:7, 17:12, 17:19, 17:22, 18:10, 18:12, 18:16, 18:20, 18:24, 20:1, 20:9, 20:13, 20:18, 23:7, 23:18, 23:22, 24:16, 24:21, 25:7, 25:11, 27:5, 27:15, 28:10, 30:21, 31:2, 34:13, 35:3, 35:11, 36:15, 37:10, 38:17, 38:22, 39:1, 39:3, 39:18, 39:20, 39:21, 39:22, 39:25, 40:2, 40:6, 40:10, 40:13, 40:15, 40:19, 40:22,</p>	<p>40:23, 41:10, 41:16, 41:20, 41:24, 42:19, 45:23, 46:2, 46:5, 46:25, 47:12, 47:14, 47:17, 48:7, 49:2, 49:15, 51:10, 51:22, 52:7, 52:22, 53:2, 53:5, 53:16, 54:18, 54:19, 54:25, 55:6, 55:11, 55:12, 56:6, 57:4, 57:7, 59:3, 59:19, 59:23, 61:1, 61:12, 62:24, 64:3, 67:9, 68:11, 69:17, 70:4, 71:11, 75:6, 76:24, 77:17, 78:11, 78:15, 79:3, 79:7 NORTHWESTERN [1] - 1:5 Northwestern's [34] - 3:24, 5:5, 6:8, 8:11, 12:5, 12:17, 13:7, 15:7, 18:1, 24:15, 30:23, 34:11, 34:15, 34:16, 35:12, 35:21, 45:24, 47:9, 47:15, 51:21, 52:4, 52:9, 52:15, 52:18, 52:19, 52:25, 54:12, 55:19, 57:9, 57:17, 64:6, 72:12, 75:22, 75:23 Notary [2] - 86:7, 86:18 note [6] - 5:15, 10:18, 49:23, 51:15, 58:19, 68:13 noted [2] - 11:5, 16:13 nothing [5] - 22:7, 24:6, 42:6, 48:22, 48:24 notion [2] - 20:25, 44:13 number [8] - 13:11, 20:23, 36:12, 62:2, 63:10, 79:19 numbers [2] - 57:18, 57:19 NWE [1] - 52:13 NWE's [2] - 52:1, 52:5 NYSEG [1] - 51:1</p>	<p>19:14, 20:21, 23:9, 23:17, 25:4, 25:7, 25:11, 33:23, 34:1, 34:3, 35:11, 35:14, 36:10, 36:13, 38:20, 39:8, 39:17, 39:20, 39:23, 40:12, 40:18, 41:11, 42:9, 42:11, 42:14, 43:5, 45:18, 45:20, 45:22, 46:22, 46:23, 47:1, 47:12, 47:16, 47:21, 48:6, 49:12, 49:14, 49:17, 49:21, 50:5, 50:21, 51:7, 51:19, 52:14, 53:5, 53:6, 53:9, 53:12, 53:17, 54:17, 54:20, 55:4, 55:9, 55:18, 56:7, 57:8, 58:1, 59:21, 59:22, 61:4, 61:8, 61:19, 64:2, 65:9, 66:25, 67:2, 67:10, 70:7, 70:15, 71:4, 71:21, 74:2, 74:16, 75:8, 75:10, 75:20, 76:1, 76:11, 76:25, 77:23, 78:6, 79:7, 83:23, 84:16 OAK [1] - 1:4 objecting [1] - 80:24 obligated [1] - 48:12 obligation [34] - 17:17, 19:20, 20:1, 21:23, 22:4, 22:11, 22:15, 25:15, 25:22, 29:6, 36:14, 36:22, 36:25, 37:24, 42:9, 43:6, 43:11, 43:18, 44:2, 44:11, 44:12, 44:15, 44:19, 45:2, 45:9, 48:7, 56:9, 57:12, 59:7, 60:11, 63:7, 63:21, 73:20, 79:6 obligation' [1] - 43:20 obligations [3] - 16:22, 18:12, 48:16 observations [1] - 72:14 observer [2] - 73:6, 73:15 obtain [2] - 32:19, 37:8 obviously [7] - 3:22, 13:11, 17:17, 34:12, 47:17, 64:7, 65:13 occurred [2] - 25:7, 25:12 OF [6] - 1:2, 1:4, 2:6,</p>	<p>86:1, 86:3 offer [10] - 21:18, 37:12, 45:16, 72:8, 72:12, 72:22, 79:20, 79:25, 80:10, 80:25 offered [16] - 16:20, 21:9, 21:19, 22:1, 23:13, 23:14, 26:9, 26:16, 27:8, 38:17, 45:18, 72:17, 74:11, 77:7, 79:20 offering [12] - 10:19, 28:4, 67:14, 68:9, 69:5, 72:9, 72:14, 72:19, 72:20, 74:25, 76:14, 82:12 offers [2] - 20:22, 39:9 Oklahoma [6] - 37:13, 37:15, 37:16, 37:19, 38:9, 38:10 omnibus [1] - 4:22 Omnibus [7] - 34:5, 34:17, 34:23, 36:9, 50:22, 53:7, 55:10 once [5] - 5:7, 5:10, 5:11, 33:9, 37:2 one [37] - 3:25, 4:2, 5:4, 9:19, 12:19, 12:22, 16:14, 17:14, 17:20, 21:21, 26:18, 28:9, 31:20, 31:21, 33:24, 34:8, 34:21, 39:14, 42:16, 42:20, 50:21, 62:15, 62:24, 65:1, 68:15, 68:16, 70:24, 72:3, 73:1, 75:21, 77:2, 77:22, 77:25, 80:16, 81:2, 83:5, 83:19 one's [1] - 83:5 ones [1] - 82:25 Onida [1] - 86:13 open [1] - 6:23 opened [1] - 27:6 operate [1] - 6:21 operates [1] - 12:4 operating [1] - 52:11 operations [1] - 51:13 opining [1] - 81:15 opinion [21] - 10:17, 10:19, 16:21, 20:22, 26:9, 28:14, 35:9, 54:12, 64:2, 64:25, 65:12, 73:7, 74:6, 74:7, 76:16, 76:22, 77:7, 77:15, 80:9, 80:10, 80:25 opinions [30] - 12:14, 20:23, 21:18, 27:22, 27:23, 65:8, 65:13,</p>
--	---	---	--	--

<p>69:5, 69:8, 70:14, 72:9, 72:12, 72:18, 72:19, 72:22, 72:25, 73:5, 73:6, 73:10, 73:13, 73:15, 73:17, 74:9, 76:13, 78:3, 79:20, 82:13</p> <p>opportunities [1] - 35:25</p> <p>opportunity [3] - 24:4, 35:2, 70:2</p> <p>opt [3] - 37:16, 38:4, 38:11</p> <p>opt-out [3] - 37:16, 38:4, 38:11</p> <p>option [2] - 36:23, 39:14</p> <p>options [1] - 26:20</p> <p>oral [2] - 29:25, 82:13</p> <p>orally [1] - 32:11</p> <p>order [12] - 16:8, 19:18, 20:3, 22:3, 23:4, 35:4, 35:17, 40:8, 43:15, 46:7, 48:18, 68:2</p> <p>ordered [1] - 51:1</p> <p>orders [1] - 62:16</p> <p>organized [2] - 6:16, 60:23</p> <p>original [1] - 72:10</p> <p>otherwise [2] - 37:5, 80:3</p> <p>ourselves [1] - 32:18</p> <p>output [16] - 17:18, 19:24, 22:6, 36:15, 37:3, 40:25, 43:11, 44:2, 46:23, 47:3, 47:22, 48:10, 54:18, 54:23, 61:9, 63:15</p> <p>outset [3] - 35:1, 41:9, 68:13</p> <p>outside [1] - 18:14</p> <p>overall [1] - 53:3</p> <p>overly [1] - 53:17</p> <p>overruled [1] - 46:8</p> <p>overwhelmingly [1] - 60:5</p> <p>own [14] - 6:20, 12:22, 16:10, 24:19, 39:1, 39:4, 39:10, 39:15, 39:19, 46:12, 65:4, 71:2, 71:19, 75:4</p> <p>owns [1] - 12:4</p>	<p>26:23, 28:11, 44:20, 47:11, 47:12, 73:19, 74:1, 80:17, 80:20, 82:18, 84:17</p> <p>paid [2] - 39:18, 40:12</p> <p>paint [1] - 6:7</p> <p>papers [2] - 21:1, 36:17</p> <p>Papke [1] - 9:16</p> <p>paragraph [5] - 28:11, 43:16, 44:20, 68:1, 80:18</p> <p>part [14] - 8:23, 17:22, 18:11, 23:3, 26:10, 27:17, 29:20, 42:3, 53:6, 56:23, 57:24, 62:19, 77:14, 84:13</p> <p>participate [2] - 11:9, 33:17</p> <p>participating [1] - 33:16</p> <p>particular [5] - 12:7, 29:8, 33:24, 42:10, 70:3</p> <p>particularly [1] - 29:3</p> <p>parties [16] - 19:4, 19:6, 19:15, 23:4, 25:21, 27:15, 29:24, 31:19, 35:25, 46:13, 50:14, 51:5, 55:3, 57:1, 57:3, 57:23</p> <p>partners [2] - 38:5, 50:23</p> <p>Partnership [1] - 51:3</p> <p>parts [1] - 34:19</p> <p>party [7] - 18:5, 19:7, 25:25, 36:3, 36:7, 59:20, 68:8</p> <p>party's [1] - 38:14</p> <p>past [1] - 77:8</p> <p>pause [1] - 7:25</p> <p>pay [5] - 7:9, 7:12, 7:15, 19:7, 53:1</p> <p>payers [2] - 7:12, 35:21</p> <p>paying [2] - 31:1, 55:19</p> <p>Pedersen [1] - 1:16</p> <p>peer [5] - 69:1, 69:18, 70:20, 71:11, 71:14</p> <p>penalties [1] - 16:6</p> <p>pending [1] - 22:13</p> <p>Penn [2] - 44:13, 44:17</p> <p>Penn's [1] - 44:9</p> <p>people [1] - 73:8</p> <p>peradventure [1] - 12:15</p> <p>percent [1] - 80:2</p> <p>perception [1] - 73:2</p>	<p>perfectly [2] - 65:20, 82:14</p> <p>perform [1] - 70:10</p> <p>perhaps [2] - 30:12, 81:10</p> <p>period [4] - 39:12, 39:24, 51:22, 60:8</p> <p>permits [1] - 43:17</p> <p>person [3] - 4:1, 50:1, 65:4</p> <p>personal [3] - 24:18, 73:12, 75:4</p> <p>personnel [1] - 8:12</p> <p>persons [1] - 76:13</p> <p>perspective [1] - 34:12</p> <p>permits [2] - 9:19, 10:6</p> <p>PFC [2] - 51:1, 74:22</p> <p>phone [4] - 3:15, 49:7, 58:14, 62:11</p> <p>phones [1] - 5:1</p> <p>pick [1] - 49:9</p> <p>picked [1] - 62:10</p> <p>picture [1] - 6:7</p> <p>Pierre [1] - 2:8</p> <p>pivotal [1] - 20:21</p> <p>place [5] - 18:6, 19:13, 19:20, 48:19, 83:1</p> <p>placed [1] - 8:9</p> <p>places [1] - 22:18</p> <p>placing [1] - 32:18</p> <p>plain [3] - 38:19, 58:21, 72:22</p> <p>plainly [2] - 70:5, 80:9</p> <p>plaintiff [1] - 8:20</p> <p>Plaintiff's [2] - 68:19, 68:21</p> <p>plans [3] - 14:2, 51:14, 61:1</p> <p>plant [6] - 35:17, 47:16, 47:20, 48:5, 53:25, 54:10</p> <p>plate [1] - 45:17</p> <p>plausible [2] - 38:23, 58:21</p> <p>play [5] - 8:9, 9:1, 30:13, 76:8</p> <p>playing [1] - 29:9</p> <p>pleadings [1] - 36:4</p> <p>pled [1] - 10:1</p> <p>plowing [1] - 66:8</p> <p>point [28] - 7:25, 8:16, 9:15, 10:24, 13:10, 14:6, 14:23, 15:3, 15:18, 31:12, 32:17, 32:18, 33:11, 38:24, 39:22, 49:7, 50:10, 50:17, 54:22, 55:12, 55:21, 56:19, 58:5,</p>	<p>60:3, 63:19, 63:21, 66:11, 75:9</p> <p>pointed [3] - 53:18, 60:16, 71:17</p> <p>pointing [2] - 10:10, 15:8</p> <p>points [4] - 7:1, 53:22, 69:20, 77:23</p> <p>police [1] - 68:21</p> <p>policy [27] - 15:17, 17:2, 17:5, 20:25, 21:7, 21:10, 21:11, 21:15, 22:4, 22:8, 22:16, 22:19, 28:12, 28:15, 28:24, 29:2, 29:4, 29:6, 35:6, 36:2, 43:5, 46:16, 48:13, 48:14, 48:15, 48:17, 61:10</p> <p>portfolio [1] - 7:7</p> <p>portion [1] - 13:19</p> <p>portions [5] - 5:17, 5:20, 6:3, 7:21, 83:21</p> <p>position [22] - 11:9, 18:1, 18:2, 18:7, 18:19, 19:15, 19:16, 20:9, 22:18, 32:18, 35:12, 41:16, 47:7, 48:1, 57:9, 59:4, 60:17, 63:6, 63:11, 72:13, 74:19, 83:10</p> <p>possibility [1] - 24:22</p> <p>possible [1] - 35:20</p> <p>posthearing [5] - 26:14, 28:3, 56:21, 58:9, 65:16</p> <p>potential [3] - 55:14, 55:16, 62:25</p> <p>POWER [1] - 1:5</p> <p>power [24] - 3:5, 13:15, 13:20, 14:9, 35:16, 36:16, 37:17, 37:22, 38:2, 38:5, 38:12, 38:15, 45:3, 45:6, 45:11, 47:14, 50:23, 51:17, 53:1, 53:2, 54:5, 54:15, 63:8, 75:18</p> <p>PPA [2] - 36:20, 39:4</p> <p>practice [2] - 23:19, 33:19</p> <p>practicing [1] - 21:13</p> <p>precedent [5] - 50:18, 54:16, 62:19, 62:23, 66:3</p> <p>predecessor [1] - 51:2</p> <p>preempted [1] - 37:18</p> <p>preference [1] - 34:5</p> <p>preferred [3] - 17:1,</p>	<p>70:19, 71:9</p> <p>prefiled [7] - 12:12, 12:18, 16:24, 26:17, 53:4, 71:5, 74:11</p> <p>Prehearing [2] - 5:5, 5:14</p> <p>prehearing [2] - 28:11, 57:1</p> <p>prejudgment [2] - 31:11, 66:14</p> <p>preliminary [2] - 4:13, 5:5</p> <p>premise [1] - 15:23</p> <p>prepare [4] - 64:3, 64:8, 64:11, 65:1</p> <p>prepared [8] - 12:11, 30:7, 39:19, 40:14, 40:15, 42:16, 64:23, 69:23</p> <p>preparing [1] - 42:5</p> <p>preponderance [1] - 67:24</p> <p>present [5] - 4:1, 32:11, 36:1, 74:19</p> <p>presentation [3] - 15:4, 27:3, 83:8</p> <p>presentations [1] - 16:7</p> <p>presented [4] - 29:15, 29:24, 57:18, 66:3</p> <p>presenting [1] - 34:8</p> <p>presents [1] - 40:7</p> <p>preserve [1] - 35:20</p> <p>presume [2] - 17:3, 20:11</p> <p>pretty [1] - 81:3</p> <p>prevail [1] - 58:2</p> <p>prevent [3] - 43:13, 43:20, 45:13</p> <p>previously [7] - 9:17, 19:11, 20:10, 70:7, 70:17, 71:11, 75:10</p> <p>price [23] - 37:21, 38:2, 38:11, 40:2, 40:5, 40:11, 40:15, 40:16, 40:24, 41:20, 42:4, 47:15, 48:4, 51:16, 69:11, 69:16, 70:11, 71:25, 72:1, 75:19, 75:24, 78:13</p> <p>prices [8] - 13:19, 13:20, 14:1, 14:3, 14:5, 52:3, 52:7, 52:12</p> <p>primarily [2] - 7:19, 27:19</p> <p>primary [2] - 11:2, 75:23</p> <p>prime [1] - 13:20</p> <p>principles [1] - 68:5</p>
--	---	--	---	---

P

P.2d [1] - 37:14
p.m [2] - 2:10, 85:6
page [13] - 26:19,

<p>pro [3] - 33:18, 80:12, 83:4 problem [2] - 58:1, 60:7 procedural [1] - 57:7 Procedure [1] - 20:17 proceed [6] - 9:11, 43:2, 57:6, 57:10, 57:25, 58:6 proceeding [20] - 7:23, 8:9, 8:23, 9:25, 16:16, 18:11, 18:15, 18:18, 22:20, 22:23, 42:13, 42:15, 59:20, 61:17, 63:8, 64:10, 66:9, 69:19, 70:1, 72:3 proceeding's [1] - 9:25 PROCEEDINGS [1] - 2:6 Proceedings [2] - 1:8, 85:6 proceedings [5] - 15:10, 18:14, 74:22, 86:9, 86:12 process [12] - 7:3, 9:1, 11:8, 19:13, 20:12, 25:6, 25:12, 56:21, 57:1, 58:9, 66:10, 79:11 processes [2] - 25:13, 27:4 produce [5] - 6:24, 39:11, 39:14, 64:18, 69:22 produced [2] - 41:13, 71:23 product [1] - 68:4 production [2] - 35:18, 61:15 Professional [2] - 86:6, 86:19 program [2] - 15:13, 16:5 prohibits [1] - 38:25 project [19] - 8:6, 12:23, 16:10, 35:15, 35:16, 35:20, 36:12, 37:7, 39:4, 49:14, 54:22, 54:23, 55:15, 60:21, 71:2, 71:4, 71:19, 71:21 projects [3] - 23:18, 39:1, 39:6 proof [1] - 39:23 proper [4] - 13:6, 26:5, 28:4, 41:3 properly [4] - 26:10, 28:3, 34:1, 77:21</p>	<p>proponent [3] - 67:14, 67:22 proposed [1] - 47:5 proposing [3] - 71:2, 71:19, 83:17 proposition [4] - 38:18, 38:21, 39:9, 54:14 protect [1] - 73:23 Protection [1] - 15:14 protesters [1] - 44:9 prove [2] - 35:13, 67:23 provide [10] - 26:25, 36:24, 43:18, 45:3, 45:10, 46:15, 58:20, 58:21, 75:1, 75:24 provided [8] - 24:10, 29:17, 70:4, 70:18, 70:22, 71:12, 78:4, 78:9 provides [5] - 8:4, 43:21, 51:20, 52:6, 52:9 providing [6] - 33:13, 47:14, 64:15, 69:25, 78:10, 78:12 proving [1] - 68:7 provision [1] - 35:23 prudent [1] - 15:12 PSC [2] - 77:24, 78:1 public [2] - 56:1 Public [9] - 5:19, 6:6, 12:20, 12:21, 44:22, 70:25, 71:16, 86:7, 86:18 PUBLIC [2] - 1:1, 1:10 PUC [18] - 13:6, 23:7, 28:12, 35:7, 35:19, 44:7, 44:8, 44:17, 44:22, 44:23, 45:1, 45:4, 45:8, 47:24, 68:3, 71:3, 71:20 PUC's [1] - 45:6 pull [2] - 63:10, 81:6 purchase [12] - 3:4, 6:22, 16:2, 16:9, 35:17, 36:17, 36:21, 37:17, 37:21, 50:13, 54:15, 75:18 PURCHASE [1] - 1:5 purchased [3] - 6:16, 37:22, 43:14 purchasing [2] - 51:17, 52:13 purely [1] - 58:8 PURPA [31] - 17:4, 20:23, 20:25, 26:20, 27:1, 27:4, 37:18, 38:24, 43:12, 45:5,</p>	<p>53:10, 62:15, 72:14, 72:16, 72:19, 74:3, 74:6, 74:12, 74:18, 74:20, 74:23, 76:14, 76:15, 76:18, 76:22, 77:9, 78:23, 79:10, 80:8, 81:15 purported [1] - 15:7 purports [1] - 80:25 purpose [5] - 17:13, 17:21, 27:10, 45:13, 75:23 pursuant [5] - 21:15, 35:23, 36:22, 36:24, 41:13 put [8] - 5:1, 12:24, 19:8, 29:21, 64:6, 76:19 puts [1] - 76:6</p>	<p style="text-align: center;">Q</p>	<p>QF [24] - 22:3, 35:8, 37:3, 37:17, 39:9, 39:14, 43:14, 44:1, 45:3, 45:10, 50:8, 50:12, 50:13, 51:8, 51:11, 54:5, 55:14, 55:16, 55:22, 58:18, 58:22, 59:1, 60:21, 62:25 QF's [1] - 59:14 QFs [6] - 35:5, 38:18, 38:25, 39:6, 44:23, 73:23 qualifications [6] - 21:17, 69:9, 76:10, 77:17, 77:23, 78:2 qualified [17] - 10:15, 21:18, 67:12, 67:19, 68:4, 68:15, 68:17, 69:10, 70:6, 72:8, 75:1, 76:4, 77:19, 77:21, 79:18, 79:20, 80:10 qualifies [1] - 67:16 qualify [1] - 70:12 qualifying [10] - 19:22, 26:20, 26:24, 36:23, 40:25, 43:11, 43:17, 43:22, 43:24, 48:20 quasi [1] - 29:2 quasi-judicial [1] - 29:2 questions [31] - 3:23, 7:25, 8:1, 9:10, 11:14, 17:7, 17:8, 20:6, 26:22, 27:2, 28:7, 29:11, 30:6,</p>	<p>30:9, 56:10, 56:13, 56:24, 58:7, 58:8, 61:23, 63:22, 63:23, 65:14, 65:22, 66:13, 66:15, 80:15, 81:25, 82:21, 83:12, 83:19 quibbled [1] - 46:5 quick [2] - 81:15, 82:3 quickly [1] - 65:3 quid [2] - 80:12, 83:4 quite [2] - 30:3, 30:16 quo [2] - 80:12, 83:4 quote [1] - 50:24</p>	<p style="text-align: center;">R</p>	<p>raises [3] - 16:19, 20:1, 61:7 rate [19] - 7:10, 7:11, 7:12, 7:16, 12:24, 18:17, 24:21, 28:23, 35:21, 36:12, 38:15, 39:15, 40:23, 48:13, 49:16, 51:25, 61:20, 63:16, 69:1 rates [3] - 7:9, 24:25, 49:14 rather [4] - 10:21, 28:12, 56:20, 76:9 rational [1] - 47:7 rationally [2] - 73:1, 76:15 reach [1] - 22:23 read [1] - 47:5 readiness [2] - 61:4, 61:7 ready [1] - 54:9 real [1] - 45:14 really [11] - 19:2, 19:23, 45:19, 47:1, 47:23, 48:14, 54:20, 60:4, 61:18, 74:24, 81:15 Realtime [2] - 86:6, 86:19 reason [8] - 16:7, 18:7, 19:3, 24:23, 59:11, 59:22, 64:14, 71:22 reasonable [1] - 51:11 reasons [5] - 23:15, 28:1, 47:8, 57:3, 76:24 rebut [1] - 20:3 rebut's [1] - 20:24 rebuttal [34] - 5:17, 5:21, 5:25, 6:3, 6:4, 7:21, 8:3, 8:4, 9:3, 9:8, 11:11, 12:2,</p>	<p>12:13, 12:17, 23:6, 11 24:12, 25:18, 25:24, 26:5, 26:17, 27:7, 27:9, 27:13, 30:24, 31:3, 57:20, 58:3, 58:12, 71:6, 73:18, 74:12, 75:5, 79:14, 84:18 recalcitrant [2] - 35:9, 43:14 receive [2] - 38:1, 59:14 received [1] - 82:25 recent [5] - 43:8, 43:25, 53:12, 60:12, 60:18 recently [1] - 25:24 recognize [1] - 30:17 recommend [1] - 25:16 recommendation [5] - 22:10, 30:25, 57:14, 65:15, 81:13 recommended [1] - 66:10 recommends [2] - 56:19, 58:9 record [9] - 9:6, 33:10, 40:20, 52:21, 58:2, 60:5, 61:3, 70:5, 71:7 recoverable [2] - 8:19, 8:21 recovered [2] - 24:20, 25:1 recovery [1] - 18:17 refer [1] - 21:2 reference [2] - 45:6, 84:20 referring [2] - 17:2, 44:7 refusal [1] - 73:24 refuse [1] - 43:14 refused [2] - 41:10, 45:1 refuses [2] - 19:25, 39:11 REFUSING [1] - 1:5 refusing [2] - 3:4, 43:23 refute [1] - 13:13 regarding [17] - 7:17, 8:5, 8:7, 9:4, 12:5, 23:18, 31:1, 42:15, 53:4, 69:22, 70:15, 72:16, 72:18, 72:19, 74:22, 75:4, 76:22 region [1] - 14:4 Registered [2] - 86:5, 86:19</p>
--	---	---	---	---	--	---	---	--

<p>regulate [1] - 15:14 regulation [7] - 38:19, 44:5, 44:17, 45:12, 46:21, 49:22, 58:22 Regulation [1] - 36:18 regulations [11] - 19:19, 37:20, 45:1, 45:5, 47:21, 48:6, 48:18, 60:20, 73:21, 74:14, 79:10 regulator [1] - 15:12 regulators [1] - 38:10 Regulatory [1] - 43:7 regulatory [4] - 37:16, 38:4, 38:11, 45:7 rejected [2] - 72:3, 77:24 relate [1] - 61:25 related [5] - 5:18, 5:22, 7:22, 23:6, 75:24 relates [1] - 6:5 relating [1] - 24:13 relative [1] - 19:4 relevant [20] - 5:20, 10:22, 12:16, 13:1, 13:9, 16:17, 18:5, 20:4, 23:20, 24:9, 25:14, 26:20, 67:19, 67:21, 68:3, 68:21, 78:17, 78:20, 79:4, 79:11 reliability [3] - 68:25, 69:3, 76:2 reliable [5] - 40:6, 67:20, 67:21, 68:5, 72:2 reliably [1] - 68:6 reliance [2] - 45:6, 57:19 relied [2] - 42:4, 57:17 relies [1] - 27:16 rely [1] - 71:1 remains [1] - 18:18 remembering [1] - 77:4 reminder [1] - 3:18 renewable [5] - 7:6, 15:21, 15:25, 16:2, 16:9 reopening [1] - 37:16 repeats [1] - 48:1 Reported [1] - 1:24 reporter [4] - 3:19, 41:6, 49:8, 86:9 Reporter [4] - 86:6, 86:19, 86:19 representations [1] - 12:5 representative [1] -</p>	<p>79:7 request [1] - 83:24 requested [1] - 70:15 requesting [2] - 26:25, 35:22 requests [5] - 5:16, 11:11, 53:6, 56:6, 76:25 require [6] - 20:25, 32:16, 38:11, 39:13, 55:14, 60:20 required [9] - 16:2, 35:4, 41:13, 47:4, 53:1, 61:19, 67:17, 69:21, 79:10 requirement [9] - 38:10, 43:21, 45:10, 45:11, 45:13, 54:3, 54:7, 55:22 requirements [13] - 26:24, 27:4, 38:13, 43:12, 44:4, 44:23, 53:24, 60:19, 62:4, 62:7, 65:11, 68:8, 76:23 requires [11] - 20:23, 45:8, 61:10, 72:19, 72:21, 74:3, 74:6, 74:12, 79:1, 80:1, 80:8 resisting [1] - 64:15 resolve [1] - 35:7 resort [4] - 5:23, 8:6, 24:14, 25:3 resource [4] - 15:24, 15:25, 51:14, 56:1 resources [9] - 6:22, 8:12, 14:10, 15:21, 51:13, 52:11, 60:22, 61:17, 64:6 respect [35] - 15:19, 16:21, 17:11, 18:10, 19:1, 20:5, 21:3, 21:20, 21:23, 22:10, 24:12, 24:14, 25:3, 25:19, 29:7, 41:10, 41:17, 48:15, 53:22, 58:18, 58:24, 59:18, 60:10, 60:12, 61:12, 61:18, 64:16, 67:9, 67:10, 71:25, 72:10, 73:25, 74:3, 79:22, 84:17 respectfully [3] - 9:7, 11:10, 76:24 respond [2] - 35:25, 56:10 responding [2] - 15:6, 15:8 response [9] - 11:16,</p>	<p>15:4, 26:6, 45:18, 47:9, 48:22, 53:16, 55:11, 63:4 responsibilities [1] - 28:10 responsible [2] - 20:2, 46:9 responsive [4] - 25:25, 80:19, 84:18, 84:19 rest [1] - 6:25 restrictive [1] - 53:23 rests [1] - 67:21 result [1] - 45:9 results [2] - 14:1, 71:23 revenue [1] - 59:14 reverse [1] - 6:23 review [9] - 64:9, 69:1, 69:18, 70:21, 71:11, 76:14, 76:15, 76:18 reviewing [1] - 20:21 RGG [1] - 52:1 Richard [4] - 5:18, 6:3, 23:6, 51:25 richer [1] - 19:7 rights [2] - 36:16, 38:18 ripe [2] - 36:9, 43:1 risk [1] - 15:13 Rislov [1] - 1:16 rolayne [1] - 1:14 role [1] - 29:8 Ross [1] - 1:16 rounds [1] - 52:16 Rounds [1] - 1:18 rounds' [1] - 11:5 Rounds's [1] - 57:14 RPR [1] - 1:24 Rule [3] - 20:17, 54:4, 67:17 rule [14] - 11:7, 21:6, 22:11, 22:21, 36:21, 37:16, 55:24, 57:15, 66:15, 72:23, 73:10, 80:2, 82:9 rule-making [2] - 11:7 Rules [2] - 13:2, 20:17 rules [10] - 62:4, 62:8, 62:16, 62:23, 67:8, 73:22, 75:3, 76:4, 77:3, 79:25 ruling [1] - 77:4 Ryan [5] - 1:15, 23:3, 29:19, 30:2, 77:14</p>	<p>Sara [1] - 4:1 sara [1] - 1:21 Saranac [2] - 50:23, 59:2 schedule [1] - 57:7 Schwab [1] - 68:18 scientific [2] - 10:12, 67:16 score [1] - 18:2 scot [1] - 55:17 scot-free [1] - 55:17 scrap [1] - 74:15 SD [3] - 68:1, 68:10, 68:19 SDCL [5] - 35:23, 72:23, 75:10, 75:11, 77:18 second [13] - 5:20, 8:2, 10:5, 14:6, 23:21, 33:25, 53:8, 54:25, 62:1, 63:5, 70:13, 73:14, 83:20 secondly [1] - 59:10 see [1] - 46:1 seeing [8] - 11:16, 20:8, 29:12, 32:1, 65:24, 66:17, 84:2, 84:24 seek [1] - 18:17 seeking [1] - 44:24 sees [1] - 26:5 sell [14] - 17:18, 19:24, 22:6, 36:15, 37:3, 44:1, 44:24, 46:23, 47:2, 47:22, 48:8, 48:10, 54:17, 61:9 selling [1] - 54:23 Semmler [3] - 1:15, 56:15, 65:7 SEMMLER [2] - 56:15, 65:12 send [2] - 30:5, 30:10 sending [1] - 48:21 sense [7] - 16:4, 18:1, 37:5, 46:25, 47:5, 47:7, 80:21 sentence [1] - 80:19 separate [7] - 6:17, 13:22, 34:5, 34:6, 34:14, 63:13 separately [2] - 5:11, 11:7 series [1] - 37:15 serious [1] - 80:3 Service [5] - 5:19, 6:6, 12:20, 70:25, 71:16 service [1] - 6:8 set [7] - 9:9, 12:19, 12:20, 26:10, 28:2, 37:6, 50:8</p>	<p>sets [1] - 40:11 setting [2] - 28:23, 66:3 settings [1] - 69:2 several [2] - 56:23, 77:22 shall [2] - 35:25, 36:23 share [1] - 65:13 short [1] - 39:2 short-term [1] - 39:2 shorten [1] - 61:16 shorthand [2] - 86:9 shot [1] - 34:8 show [7] - 8:19, 16:8, 19:13, 36:6, 39:23, 55:14, 67:15 showing [1] - 55:18 shown [1] - 72:1 shows [1] - 52:1 sign [2] - 19:25, 73:24 significant [2] - 26:11, 69:20 significantly [1] - 38:12 similar [2] - 64:19, 82:9 similarly [1] - 45:8 simple [1] - 61:22 simply [14] - 6:9, 13:3, 13:8, 15:6, 17:1, 18:1, 20:24, 24:20, 26:18, 28:15, 40:4, 45:17, 46:2, 59:7 single [1] - 65:3 sitting [1] - 29:2 situation [5] - 19:3, 19:6, 19:21, 45:21, 61:12 situations [1] - 32:16 skill [3] - 10:16, 75:12, 77:19 skilled [2] - 73:6, 73:15 slightly [1] - 27:6 slow [2] - 3:19, 14:15 Smith [13] - 1:13, 8:17, 19:1, 32:6, 33:20, 37:12, 38:7, 38:8, 50:6, 59:12, 81:7, 81:12, 82:16 SMITH [9] - 32:7, 33:1, 33:8, 33:14, 81:9, 81:14, 82:7, 84:15, 84:20 sole [1] - 30:24 sometimes [2] - 15:9, 69:3 somewhere [1] - 29:18 soon [1] - 35:19</p>	12
		S			
		sanity [1] - 73:16			

<p>sorry [4] - 28:17, 58:14, 62:10, 79:9</p> <p>sort [8] - 15:13, 20:16, 21:1, 28:24, 40:1, 41:19, 59:23, 70:11</p> <p>sound [2] - 30:14, 78:3</p> <p>South [54] - 2:7, 2:9, 6:12, 6:13, 6:15, 6:16, 6:18, 6:21, 7:1, 7:5, 7:9, 7:10, 7:15, 8:17, 9:16, 10:10, 12:4, 12:21, 13:2, 13:17, 14:7, 14:9, 14:10, 14:11, 14:22, 15:2, 15:15, 15:16, 15:20, 16:1, 16:5, 16:13, 16:18, 23:23, 24:2, 29:5, 46:1, 52:25, 55:1, 55:3, 62:22, 62:25, 63:1, 63:2, 67:8, 70:5, 74:10, 74:20, 75:3, 75:25, 81:22, 86:7, 86:13</p> <p>SOUTH [2] - 1:2, 86:1</p> <p>SOYE [3] - 23:2, 29:19, 77:13</p> <p>Soye [5] - 1:15, 23:3, 29:19, 77:14, 83:9</p> <p>Soye's [1] - 30:25</p> <p>speaker [2] - 49:7, 62:11</p> <p>speaking [1] - 28:22</p> <p>specialized [2] - 10:13, 67:16</p> <p>specific [4] - 51:13, 51:14, 80:18</p> <p>specifically [7] - 12:10, 21:3, 43:13, 44:21, 51:22, 72:3, 75:17</p> <p>specified [5] - 37:1, 37:2, 43:19, 48:11, 51:9</p> <p>specify [4] - 36:19, 49:17, 58:19, 58:22</p> <p>specter [1] - 20:2</p> <p>speculative [1] - 24:24</p> <p>speed [1] - 73:11</p> <p>spell [1] - 41:5</p> <p>spend [1] - 61:17</p> <p>spends [1] - 18:13</p> <p>Spion [3] - 40:22, 61:13, 64:10</p> <p>SPION [1] - 41:7</p> <p>split [1] - 34:19</p> <p>splitting [1] - 34:13</p> <p>sports [1] - 67:25</p> <p>spot [1] - 51:17</p>	<p>SS [1] - 86:2</p> <p>Staff [51] - 5:13, 11:4, 18:13, 23:1, 23:3, 23:12, 23:14, 23:16, 23:19, 24:2, 24:6, 24:15, 25:4, 25:16, 25:21, 26:2, 26:11, 26:15, 27:5, 27:8, 29:14, 29:15, 29:20, 29:23, 32:10, 52:16, 56:11, 56:13, 56:14, 56:16, 56:19, 56:24, 57:11, 58:1, 58:9, 60:16, 65:6, 65:8, 65:13, 66:3, 66:10, 77:12, 77:14, 77:17, 77:21, 78:17, 78:25, 79:4, 79:17, 82:4</p> <p>STAFF [1] - 1:13</p> <p>Staff's [3] - 22:10, 77:15, 83:7</p> <p>stage [1] - 26:14</p> <p>stakeholders [1] - 22:22</p> <p>stand [1] - 53:23</p> <p>standards [2] - 7:7, 13:2</p> <p>standpoint [1] - 66:9</p> <p>stands [3] - 44:13, 54:13, 61:6</p> <p>start [2] - 10:2, 49:6</p> <p>started [1] - 4:5</p> <p>starting [3] - 7:3, 45:19, 73:19</p> <p>startling [1] - 47:10</p> <p>starts [1] - 72:18</p> <p>STATE [2] - 1:2, 86:1</p> <p>state [14] - 6:9, 12:18, 16:21, 21:13, 38:10, 46:18, 58:17, 58:25, 61:3, 62:18, 62:20, 68:10, 75:9, 84:16</p> <p>State [15] - 2:7, 10:25, 29:5, 39:13, 44:3, 46:7, 46:8, 46:16, 50:22, 51:5, 54:14, 62:14, 62:25, 63:1, 86:7</p> <p>state's [2] - 38:13, 53:14</p> <p>statement [3] - 28:12, 46:8, 74:14</p> <p>statements [7] - 16:23, 18:23, 23:18, 74:11, 76:1, 76:3, 76:7</p> <p>States [2] - 56:3, 67:13</p> <p>states [15] - 10:12, 10:25, 35:24, 36:21,</p>	<p>38:6, 40:10, 44:10, 44:14, 44:18, 46:17, 46:19, 47:12, 53:10, 55:13, 62:3</p> <p>states' [1] - 53:22</p> <p>stating [1] - 24:20</p> <p>status [1] - 33:18</p> <p>statute [1] - 46:11</p> <p>Statute [1] - 10:10</p> <p>statutes [2] - 15:20, 15:22</p> <p>stay [1] - 81:23</p> <p>Steven [4] - 52:6, 68:12, 83:20, 83:24</p> <p>sticking [1] - 65:14</p> <p>still [6] - 3:7, 4:24, 32:3, 32:4, 63:10, 79:17</p> <p>stole [1] - 76:12</p> <p>Stone [2] - 52:5, 52:11</p> <p>stonewalls [1] - 19:24</p> <p>stricken [7] - 9:5, 23:15, 26:8, 27:11, 27:22, 27:25, 28:1</p> <p>Strike [13] - 3:24, 4:15, 4:21, 5:25, 25:18, 30:21, 30:23, 31:2, 31:10, 34:15, 78:7, 78:22, 84:16</p> <p>strike [18] - 5:6, 5:17, 5:20, 7:21, 9:8, 9:13, 11:11, 23:5, 25:16, 27:18, 30:25, 34:2, 54:7, 80:11, 80:12, 82:8, 83:24, 84:13</p> <p>striking [8] - 5:25, 6:2, 8:2, 24:12, 31:1, 31:9, 31:10, 77:15</p> <p>struggling [1] - 32:3</p> <p>stuck [1] - 57:25</p> <p>stuff [3] - 74:7, 80:9, 81:20</p> <p>Subject [5] - 44:16, 71:10, 75:13, 78:25, 80:13</p> <p>subjected [1] - 70:20</p> <p>subjects [1] - 73:10</p> <p>submissions [1] - 27:17</p> <p>submit [5] - 36:8, 42:25, 47:7, 48:16, 61:6</p> <p>submitted [2] - 12:11, 57:8</p> <p>substance [3] - 13:5, 26:16, 27:19</p> <p>substantial [1] - 51:23</p> <p>substantially [3] - 9:21, 37:7, 54:13</p> <p>substantive [1] -</p>	<p>65:14</p> <p>substitute [1] - 81:11</p> <p>substitutes [1] - 78:19</p> <p>substitution [1] - 81:10</p> <p>sufficient [2] - 68:4, 78:4</p> <p>suggestion [1] - 81:8</p> <p>SULLY [1] - 86:3</p> <p>summary [5] - 35:22, 35:24, 36:10, 43:1, 57:22</p> <p>summation [1] - 22:8</p> <p>superior [1] - 75:11</p> <p>supply [1] - 14:8</p> <p>support [1] - 63:16</p> <p>supporting [2] - 73:9, 73:13</p> <p>supports [2] - 11:9, 38:20</p> <p>suppose [1] - 61:5</p> <p>supposed [1] - 35:7</p> <p>Supreme [6] - 8:17, 9:16, 37:15, 37:19, 38:9, 67:13</p> <p>surrounding [1] - 9:1</p> <p>surveillance [1] - 68:22</p> <p>suspect [1] - 34:23</p> <p>swayed [1] - 83:10</p> <p>synonymous [1] - 51:16</p> <p>system [6] - 6:13, 7:14, 12:3, 12:4, 13:22, 13:24</p> <p>systems [8] - 6:12, 12:6, 12:8, 12:10, 15:16, 23:8, 23:22, 23:23</p> <p>systems' [1] - 13:17</p>	<p>terminating [1] - 13 45:19</p> <p>terms [6] - 21:4, 32:13, 33:14, 36:19, 44:16, 46:20</p> <p>territory [1] - 6:8</p> <p>test [1] - 70:13</p> <p>testify [15] - 10:16, 11:1, 20:15, 21:7, 67:11, 68:16, 68:17, 69:10, 72:18, 74:8, 74:21, 76:4, 80:4, 80:6, 80:8</p> <p>testifying [7] - 24:17, 72:24, 75:21, 75:22, 78:13, 79:3, 79:24</p> <p>testimony [157] - 5:18, 5:21, 5:25, 6:3, 6:5, 7:22, 8:3, 8:4, 9:3, 9:8, 9:14, 9:17, 9:19, 9:21, 9:24, 10:3, 10:4, 10:6, 10:8, 10:12, 10:22, 11:3, 11:5, 11:12, 11:23, 12:2, 12:9, 12:13, 12:18, 13:5, 15:1, 15:5, 15:6, 16:16, 16:25, 17:13, 17:22, 17:24, 19:12, 20:10, 20:20, 20:21, 20:24, 21:3, 22:1, 22:7, 23:6, 23:14, 23:15, 23:16, 24:12, 25:9, 25:11, 25:18, 25:20, 25:25, 26:3, 26:5, 26:7, 26:12, 26:15, 26:17, 27:7, 27:9, 27:10, 27:19, 27:21, 28:1, 28:5, 29:8, 30:22, 30:24, 31:1, 31:3, 33:15, 42:4, 42:24, 47:4, 47:6, 51:20, 52:2, 52:9, 52:17, 53:4, 57:8, 57:15, 57:18, 57:21, 60:2, 64:8, 67:1, 67:15, 67:18, 67:19, 67:21, 67:22, 67:23, 68:2, 68:8, 68:9, 68:20, 71:6, 71:25, 72:4, 72:16, 72:21, 72:24, 73:3, 73:18, 74:1, 74:12, 75:1, 75:2, 75:3, 75:8, 75:13, 75:20, 75:24, 76:2, 76:6, 76:11, 76:17, 76:21, 77:5, 77:6, 77:16, 78:7, 78:9, 78:10, 78:17, 78:23, 78:25, 79:2,</p>
T				
		<p>talks [1] - 74:1</p> <p>tax [2] - 35:18, 61:15</p> <p>tech [1] - 50:1</p> <p>technical [3] - 10:12, 67:16, 78:23</p> <p>TELEPHONE [1] - 2:1</p> <p>telephone [1] - 4:18</p> <p>term [27] - 36:16, 37:1, 37:2, 37:6, 37:21, 38:15, 39:2, 39:5, 39:12, 39:23, 40:5, 41:22, 42:5, 42:12, 43:19, 48:11, 50:8, 51:9, 58:19, 58:22, 59:1, 59:4, 59:16, 60:4, 70:10</p>		

79:23, 79:25, 80:12, 80:13, 80:17, 80:20, 80:24, 82:4, 82:8, 82:9, 83:19, 83:21, 83:24, 84:18 testing [1] - 69:1 Texas [14] - 44:22, 45:1, 45:4, 45:6, 46:18, 53:23, 54:2, 54:3, 55:21, 56:2, 60:13, 60:17 text [1] - 45:7 THE [5] - 1:1, 1:2, 1:4, 1:10 themselves [2] - 22:6, 24:8 theories [6] - 14:6, 14:8, 14:20, 14:24, 14:25 theory [1] - 67:15 therefore [9] - 8:22, 9:7, 11:10, 14:3, 18:22, 23:20, 25:15, 27:5, 68:2 thereto [1] - 10:17 they've [3] - 32:8, 42:21, 57:20 third [3] - 4:10, 5:24, 55:6 Thomas [3] - 6:1, 9:14, 25:19 three [9] - 5:6, 5:10, 5:11, 5:15, 9:18, 9:20, 62:15, 62:20, 67:4 throughout [2] - 10:23, 50:10 thunder [1] - 76:12 Thurber [1] - 1:18 TO [1] - 1:5 today [5] - 3:24, 5:14, 13:11, 65:14, 76:9 together [1] - 36:5 tone [2] - 26:16, 27:10 took [6] - 18:6, 19:13, 41:16, 60:17, 64:14, 86:9 tool [1] - 73:4 top [1] - 57:11 Tosh [1] - 68:18 training [2] - 10:16, 77:20 transaction [1] - 47:2 transactions [1] - 80:5 Transcript [1] - 1:8 TRANSCRIPT [1] - 2:6 transcription [1] - 86:12 treat [1] - 31:19 treatment [1] - 68:23	Tree [92] - 2:2, 2:2, 3:3, 6:7, 7:8, 7:12, 8:6, 10:1, 10:2, 10:3, 11:8, 11:16, 12:25, 14:23, 16:25, 17:16, 18:7, 18:18, 18:24, 19:14, 20:21, 23:9, 23:17, 25:4, 25:7, 25:11, 33:23, 34:1, 34:3, 35:11, 35:14, 36:10, 36:13, 38:20, 39:8, 39:17, 39:20, 40:12, 40:18, 41:11, 42:9, 42:11, 42:14, 43:5, 45:18, 45:20, 45:22, 46:12, 46:24, 47:1, 47:12, 47:16, 47:21, 48:6, 49:12, 49:14, 49:18, 49:21, 50:21, 51:7, 51:19, 52:14, 53:9, 53:12, 54:17, 54:20, 55:4, 55:9, 55:18, 57:8, 58:1, 59:21, 59:22, 61:4, 61:8, 61:19, 64:2, 65:9, 67:2, 70:7, 70:15, 74:2, 74:16, 75:10, 75:20, 76:11, 77:23, 78:6, 79:7 TREE [1] - 1:4 Tree's [19] - 4:4, 4:21, 4:22, 39:23, 50:5, 53:5, 53:6, 53:17, 56:7, 66:25, 67:10, 71:4, 71:21, 75:8, 76:1, 76:25, 83:23, 84:16 tried [3] - 18:24, 37:10, 69:7 trier [2] - 10:13, 21:21 true [3] - 42:2, 55:19, 86:11 try [1] - 18:8 trying [10] - 6:7, 7:13, 12:7, 29:15, 39:25, 47:2, 59:13, 59:19, 61:16, 81:23 turn [3] - 17:6, 17:7, 62:11 turning [1] - 32:6 turns [1] - 63:15 twice [1] - 40:23 two [29] - 6:12, 9:19, 12:6, 12:8, 12:10, 15:22, 19:4, 23:15, 33:23, 34:5, 34:19, 36:8, 36:12, 36:18, 48:24, 50:5, 56:24, 61:21, 61:25, 62:16,	62:21, 63:13, 66:15, 67:4, 73:2, 73:5, 82:10, 82:18, 83:19 type [2] - 27:6, 66:7 typed [1] - 70:20 types [1] - 73:5 typically [5] - 19:3, 21:6, 28:22, 28:24, 46:12	unreliability [1] - 52:24 unreliable [3] - 41:19, 42:23, 64:18 untenable [1] - 22:18 untimely [4] - 9:24, 25:21, 26:3, 28:2 up [17] - 11:6, 13:12, 17:20, 32:12, 34:9, 34:13, 42:21, 47:23, 49:9, 59:14, 60:12, 62:11, 79:11, 81:6, 81:14, 81:20, 82:15 upheld [1] - 55:24 upper [1] - 40:11 Utilities [2] - 12:21, 44:22 utilities [4] - 35:4, 43:10, 51:17, 54:3 UTILITIES [2] - 1:1, 1:10 utility [34] - 16:2, 19:23, 19:24, 21:4, 22:6, 26:24, 35:6, 35:8, 35:10, 37:3, 37:5, 37:23, 38:3, 39:11, 39:13, 43:14, 43:21, 44:2, 47:3, 47:18, 48:3, 48:4, 48:20, 48:22, 50:12, 51:13, 51:14, 53:24, 56:1, 59:5, 59:6, 62:25, 63:14, 69:14 utility's [3] - 51:12, 54:15, 73:24 utilized [4] - 40:16, 69:14, 70:23, 71:13	voted [1] - 33:15 14 votes [9] - 32:23, 32:24, 34:9, 66:21, 66:22, 84:6, 84:7, 85:3, 85:4 voting [1] - 32:21
		U	W	
	Uda [17] - 2:2, 3:10, 28:9, 34:20, 49:11, 50:6, 50:11, 53:18, 53:24, 58:12, 58:13, 63:5, 79:14, 80:16, 81:9, 81:17 UDA [31] - 3:15, 11:17, 11:22, 12:1, 14:17, 17:11, 20:9, 28:16, 28:20, 34:4, 34:22, 41:4, 41:7, 41:9, 43:5, 58:14, 63:12, 63:20, 64:5, 64:23, 65:2, 67:3, 67:8, 71:8, 79:15, 80:23, 81:5, 81:12, 81:19, 82:15, 82:19 Uda's [1] - 51:7 ultimate [3] - 8:8, 9:2, 9:5 ultimately [4] - 47:20, 57:12, 66:15, 76:5 unable [2] - 45:3, 73:8 uncertainties [1] - 56:5 under [23] - 13:1, 20:17, 22:4, 26:20, 26:25, 35:6, 41:22, 43:12, 43:25, 46:10, 47:21, 48:6, 53:10, 59:14, 67:8, 67:13, 67:17, 70:13, 72:23, 74:9, 77:18, 79:10, 79:25 underlying [1] - 15:23 understood [1] - 33:3 undisclosed [3] - 9:17, 20:10, 25:20 undue [1] - 64:6 unfair [2] - 7:8, 7:11 unfairness [1] - 15:5 unfavorable [1] - 38:3 United [2] - 56:3, 67:13 unless [3] - 17:6, 18:16, 20:5 unlimited [1] - 44:18	valid [2] - 70:14, 83:8 validity [1] - 53:5 valuable [1] - 61:17 value [2] - 14:20, 14:24 various [4] - 45:18, 57:3, 62:4, 70:8 Veatch [1] - 41:25 vertically [2] - 7:2, 7:3 viable [3] - 47:1, 55:14, 55:19 vice [1] - 33:18 view [1] - 45:3 violates [1] - 75:2 vitae [1] - 75:15 voice [1] - 73:16 vote [8] - 4:3, 4:10, 5:10, 32:1, 32:21, 66:17, 84:2, 84:24	wait [3] - 29:23, 56:20, 57:15 walk [1] - 55:17 wall [1] - 32:13 wants [3] - 33:17, 60:12, 80:4 WAPA [1] - 6:19 warnings [1] - 82:24 ways [4] - 40:1, 40:3, 59:20, 62:15 wealth [3] - 8:19, 8:22, 19:4 Weber [2] - 8:17, 19:1 weigh [2] - 34:10, 47:4 weight [3] - 8:9, 76:6, 76:20 well-aware [1] - 7:6 West [3] - 44:9, 44:13, 44:17 western [5] - 6:14, 13:16, 13:23, 14:2, 14:3 whichever [1] - 34:19 whistling [1] - 11:18 whoever's [1] - 4:25 whole [3] - 19:19, 22:10, 58:18 wholesale [4] - 38:12, 38:15, 75:25, 78:13 Wiest [1] - 1:14 willing [2] - 53:19, 61:9 Wind [12] - 43:25, 44:1, 44:6, 44:23, 45:1, 46:6, 48:17, 53:13, 53:18, 53:23, 54:8 wind [14] - 4:18, 14:20, 14:24, 23:18, 35:15, 49:14, 53:13, 54:10, 71:2, 71:4, 71:19, 71:21, 76:17, 77:9 wind-like [1] - 4:18 wish [2] - 31:19, 43:2 wishes [2] - 30:9, 34:13 witness [17] - 10:15, 16:14, 20:15, 24:17, 52:16, 67:11, 68:9	

72:14, 72:22, 72:23,
73:2, 75:11, 79:4,
79:24, 80:7

witnesses [6] - 13:8,
15:9, 45:25, 52:15,
67:10, 72:17, 73:12,
75:3

WITTLER [1] - 86:5

Wittler [2] - 1:24,
86:18

words [1] - 55:23

wrestle [1] - 3:23

Y

year [2] - 51:18, 59:8

years [4] - 37:17,
42:16, 48:11, 74:13

York [2] - 50:22, 51:1

Yvette [2] - 2:2, 3:8